PRINCIPLES AND PROBLEMS OF GOVERNMENT

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By
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and
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PREFACE

FREQUENTLY the study of government is approached through a description and an analysis of the organization and machinery by which public affairs are conducted. The moving forces, principles, and problems are either neglected or scantily considered amid the details of fact which such descriptive studies entail. It is on this account that political science appears to be devoted chiefly to the "external characteristics of governing institutions."

The purpose of this book is to present an approach to the study of government through the avenue of principles and problems. A few objects which have been kept constantly in view are: first, to give the necessary setting for the study of principles and problems; second, to present problems and issues for discussion rather than to impart information; third, to encourage the formation of opinions and judgments on political issues rather than to train the memory by a repetition of facts about government. Problems are presented for consideration in order to encourage thinking in concrete terms as to government organization and administration. A brief and elementary discussion of principles and problems is given with the purpose primarily of stimulating interest for further study. Though it is recognized that there is danger of reaching conclusions on insufficient information, it is believed that the habit of thinking and of forming judgments should be cultivated to a much greater extent than is customary in government instruction. For this purpose stimulating extracts and suggestive quotations from writers on political affairs are extensively used.

Except in the consideration of certain topics on which information is not readily available, no attempt has been made to give important facts as to government organization and machinery. For these facts it will be necessary to have at hand and to make constant use of year books,

legislative manuals, and standard texts which give information on governmental structure. Satisfactory texts have recently been issued which give the necessary information with respect to American and European governments. This volume is prepared to supplement the works now available on the description and the analysis of governments.

The primary object is to aid in the acquisition of a method for the investigation of government problems. It is believed that the study of government will be effective in proportion as the direct method of investigation is used. Each chapter is intended to serve merely as an introduction to the consideration of the problems and principles involved and to provide a background for the pursuit of independent inquiries. Though the primary purpose of the book is to consider some of the important issues relating to the operation of the American government, certain features of foreign governments and administrative practices are briefly discussed in order to afford a basis for comparison and contrast.

The three introductory chapters are intended to furnish the perspective which is regarded as necessary for the study of modern political problems. The chapters are presented in their natural order, but may be omitted when these topics are elsewhere considered, or may, when thought desirable, be deferred for use at the end of the volume.

Prepared primarily for use in an elementary course in colleges and universities, it is hoped that this text may also prove helpful to persons who are now seeking an introduction to the study of some important characteristics of government organization and control.

The authors are indebted to Mr. Arthur W. MacMahon of Columbia University for reading the manuscript and for offering suggestions which have added to the serviceableness of the volume.

C. G. H.
B. M. H.

Part I

INTRODUCTION TO THE STUDY OF THE PRINCIPLES AND THE PROBLEMS OF GOVERNMENT

PRINCIPLES AND PROBLEMS OF GOVERNMENT

CHAPTER I

THE ORIGIN AND THE DEVELOPMENT OF GOVERNMENT

Political institutions, like the other results of human association, are in a constant process of change. At times the transformations come more rapidly, but significant changes are always under way. The extraordinary burdens and difficulties of the world's greatest war and the consequent problems of reconstruction have brought a period of rapid transformation. Whither present institutions are tending and what will be the outcome, no one can foresee. We can feel sure only that the governments under which we now live are passing through a reconstructive process which will affect profoundly all of our social and political relations. A cursory examination of the process through which modern political institutions have evolved will aid in the understanding of this reconstructive process. Consequently, the origin and development of government will be reviewed. In the brief outline and summary of the continuous evolution thus presented are suggested some of our greatest political problems.

Earliest Evidences of Political Organization

Recent researches into history and archeology have carried the beginnings of government and social institutions back many thousands of years by bringing to light well-

defined organizations of society in nations which have been regarded as primitive and undeveloped.[1] In these societies customs and law based upon religion, arbitrary taboos, and social sanctions controlled the life of man. Government, though often crude and simple in its organization, is evidenced in the rules and regulations as well as in the customs and traditions which regulated with inexorable rigor the life of primitive communities. The laws and political institutions of such nations as Babylon, Egypt, Persia, Arabia, and India, just as much as the language and architecture of these Oriental peoples, are matters worthy of study and admiration. To ignore these ancient races as though they possessed no well-defined political organizations is not justified by the evidence of their political evolution.

Recently, through the combined results of archeology, anthropology, paleontology, geology, and ethnology, scientists have arrived at a new estimate of the age of the race and the antiquity of man has been pushed back hundreds of thousands of years, varying in different estimates from 250,000 to 600,000 years.[2]

It is difficult to think in terms of hundreds of thousands of years. Moreover, many errors result, and mistaken conclusions are formed by confining attention to the few thousand years of human history which have intervened since the time of the Greeks.

Many of the variations in man's development now evidenced in the differences in culture of present peoples may be attributed to the change in environmental influences to which man was subjected in the thousands of years antedating the use of symbols and the introduction of written records. In these ages the forces of nature and

[1] "It was not until some fifty years ago, after the evidence had been available for a century and a nalf, that the eyes of scientific men were at last opened to the fact of the enormously long sojourn of man upon the earth."—J. H. Breasted, *Ancient Times* (Ginn & Co., 1916), p. 6.

[2] *Cf.* H. F. Osborn, *Men of the Old Stone Age* (Charles Scribner's Sons, 1916), illustrations, pp. 18, 41.

the different natural environments of mankind no doubt molded in large part those physical and mental characteristics and traits which have since become hereditary and now are the distinguishing marks of the various races.

Such works as those of Boas, *The Mind of Primitive Man*, of Sollas, *Ancient Hunters*, and of Osborn, *Men of the Old Stone Age*, contain suggestive summaries of the findings of these sciences in tracing the early development of man. Although the evidence is not always conclusive and there is much room for conjecture, there is good reason to believe that man existed on this planet for several hundred thousand years and had most of the qualities and capabilities which are now regarded as distinctly human characteristics. It is quite impossible here to give the very interesting accounts which are now available of the Pithecanthropus, or Trinil race, the Heidelberg race, the Piltdown race, as well as the more highly cultured Neanderthal and Crô-Magnon races. For suggestive and illuminating discussions of these early phases of man's evolution, we can only refer to and commend the admirable works of Sollas and Osborn. However, it is well to recognize that the sciences dealing with the antiquity of man are not static, but are rapidly accumulating new information, so that it is necessary to keep in touch with the latest researches and to revise, accordingly, the standard accounts of man's early intellectual and political progress.

Among the varied remains of the Stone Age are found numerous primitive implements of stone and flint fashioned from hard materials into forms adapted to the purposes of war, the chase, and domestic life. There are also abundant evidences that these primitive races passed through an industrial stage in which human invention is turned to the satisfaction of the human needs growing out of community life. It is impossible to trace the rise of man through any particular race or races, for it is found that one race may have replaced another, or that two races may have been coexistent. The appearance in Europe of

a rather superior race during what is called the Neolithic or the new Stone Age, representing a period of about ten thousand years, must necessarily have been the result of long years of progressive development. According to Mr. Osborn, it was during this period that

> . . . the rudiments of all the modern economic powers of man were developed: the guidance of the hand by the mind, manifested in his creative industry; his inventive faculty; the currency or spread of his inventions; the adaptation of means to ends in utensils, in weapons, and in clothing. The same is true of the æsthetic powers, of close observation, of the sense of form, of proportion, of symmetry, the appreciation of beauty of animal form and the beauty of line, color, and form in modeling and sculpture. Finally, the schematic representation and notation of ideas so far as we can perceive was alphabetic, rather than pictographic. Of the musical sense we have at present no evidence. The religious sense, the appreciation of some power or powers behind the great phenomena of nature, is evidenced in the reverence for the dead, in burials apparently related to notions of a future existence of the dead, and especially in the mysteries of the art of the caverns.[1]

Thus, in these steps of intellectual progress are discernible the germs of later advancement, and with each rise and fall of cultural and industrial developments man has pushed forward by the impelling spirit of achievement within him.

Knowledge of the early beginnings of government, then, must be acquired by means of information obtained largely through the sciences of archeology, anthropology, paleontology, geology, and ethnology. A careful perusal of evidence gathered from the prehistoric ages shows that the people of very early times were learning to create an environment which would serve them in the art of living, and, in so doing, to add to the resources of nature the resources of man's genius. Utensils for domestic use as well as implements for warfare were among the earliest inventions, and these primitive peoples entered into a

[1] H. F. Osborn, *Men of the Old Stone Age* (Charles Scribner's Sons, 1916), pp. 501–502.

kind of community life whereby members of the same locality pooled their individual interests for the common good. It is, however, not with the characteristics of prehistoric periods that we are now chiefly concerned, but rather with the significant steps in the organized political development of man.

Early Steps in Organized Political Development

Only a brief survey is possible of the many thousands of years which were necessary for man to have evolved from the lower stages of human existence, which have just been referred to, up to that point where he had learned to live together with his fellow men in comparatively large numbers. This long process has involved many stages about which no definite knowledge is now obtainable. But various theories and explanations have been formulated as to the nature of the earliest common ties existing between men.

In tracing the origins of civic organization two types of early society predominate, each of which affects directly the later development of the political state. The first of these types are the nomad hunters who live in the hills and mountain districts and the second are the fishers and the agriculturist groups who live a more sedentary life in the river valleys. It is the conquest of the latter by the former which frequently laid the basis of the militaristic state. When the vigorous tribes of nomads subjugated the village dwelling and industrial peoples of the river valleys, it was customary on the part of the conquerors to exploit and appropriate the services of the conquered, thereby establishing a system of slavery as an integral part of early society.

Another factor in addition to exploitation and conquest which exerted an important influence in the origin of civil life was the control exercised by the priests. As the inhabitants of the valleys settled in villages and developed

agriculture and industries, an opportunity was afforded for domination by those who claimed connection with and powers of control over the unseen spirits which seemed to disturb and threaten the life of primitive man. Thus the forces of exploitation, conquest, and priestly control combined in the formation of distinct social groups from which patriarchal society and the political state later evolved.

The accepted basis for the beginnings of organized political life was for a long time comprised in what is termed the "Patriarchal Theory."[1] This theory traced family and community organizations to the authority and force exercised by the male member of a tribe, who, as father of a family, came to be recognized as the political chief. By recent investigations the patriarchal theory, however, has been subjected to analysis and criticism, and has been found not entirely a satisfactory explanation of the primordial cell of human society as claimed by its exponent, Sir Henry Maine.[2] The state, instead of having its origin in the *patria potestas*—the power of life and death over other members of the family and tribe, as exercised by the patriarch, the chief, judge, and priest of the household—is now traced to an earlier form of social organization where the rule of the mother predominated in the family group. This explanation of the origin of the state is known as the "Matriarchal Theory." Both of these theories are now being supplemented with the idea that formerly there existed merely an indefinite form of social organization for the protection of children and the defense of the family or the group. From earliest times some type of family life appears to have existed. It has been suggested that it is quite possible that the priority of the particular kind of family bond, whether through the male or through the female, was a matter of place and conditions, and that no

[1] *Cf.* George E. Howard, *A History of Matrimonial Institutions, Chiefly in England and the United States* (The University of Chicago Press), 1904, vol. i, p. 9.

[2] *Cf. Lectures on the Early History of Institutions* (Seventh Edition, London, Murray, 1914).

positive theory can be advanced to cover the early family in the development of the human race in all parts of the globe. One condition may have existed in one place, while the opposite may have existed in another.

At best, the matter must necessarily rest on theory, and though it is acknowledged that society originated in vague and crude forms of associations, there are a few rather important conceptions that form the underlying idea of the family which, in turn, became the basis for political organization. The natural tie for the family was through blood relationship, whether on the mother's or on the father's side. At a later date this relationship was supplemented by admitting persons of alien blood into the family precincts by adoption and also by conquest when slaves, who became an integral part of the early family and later of the state, were added to the group. With this extension of the family came the idea of protection, which formed an important element in the further organization of man's activities when unity of action was desirable for political purposes as well as for personal advantage.

The drawing together, then, of persons through blood relationship, through subjugation, and through the necessity for protection constitutes the beginnings of political or civic organization. Later, thus bound together by common family ties and interests, by desire for protection, and by subjugation, family united with family and formed a gens under some form of recognized leadership. Gens then united with gens until a tribal state was organized. When, however, the tribes confederated and settled within definite territories, the possibility of developing political institutions became increasingly greater. Time was now spent in conquering and putting to man's use the resources of nature instead of wandering from place to place as heretofore in quest of more fertile lands. When men settled within definite territory, became skilled in industries, pooled their common interests, and decided their differences through some recognized arbitrator, political relations de-

veloped. In such relations as these, primitive though they were, the complex political organizations of the present time had their beginnings.

Later Steps in Political Development

At the time of the Late Stone Age, about 3000 B.C. to 2000 B.C., the peoples of Europe were outgrowing the tribal state and gathering together in numerous villages with a more or less definite organization. Professor Breasted thus interestingly describes these villages:

> When we look at such buildings of the Late Stone Age still surviving, they prove to us the existence of the earliest towns in Europe. For near every great group of stone tombs there must have been a town where the people lived who built the tombs. The remains of some of these towns have been discovered, and they have been dug out from the earth covering them. Almost all traces of them had disappeared, but enough remained to show that they had been surrounded by walls of earth, with a ditch on the outside and probably with a wooden stockade along the top of the earth wall. They show us that men were learning to live together in considerable numbers and to work together on a large scale. It required organization and successful management of men to raise the earth walls of such a town, to drive the fifty thousand piles supporting the lake settlement at Wangen (Switzerland), or to move the enormous blocks of stone for building the chieftain's tomb. In such achievements, we see the beginnings of government, organized under a leader. Many little states, each consisting of a fortified town with its surrounding fields, and each under a chieftain, must have grown up in Late Stone Age Europe. Out of such beginnings nations were yet to grow.[1]

But this advance in civic organization among the peoples of Europe during the Late Stone Age was temporarily arrested. Political progress, as well as progress in general, was reduced to a state of stagnation and so remained until the political and cultural achievements of the Orient were carried into Europe. While a knowledge of the governments developed by the various branches of the Indo-European races, especially by the Greeks and Romans, forms a necessary background to an understanding

[1] J. H. Breasted, *Ancient Times* (Ginn & Co., 1916), pp. 26–28.

of modern governments, it is likewise essential to note the influence of Oriental civilization upon the chief political organization of Greece and Rome, the city-state.

Contributions of the Orient to Political Organization.—An advanced state of civilization with more or less complex political institutions had been flourishing for centuries in the Orient, when the peoples of continental Europe had developed no farther than the tribal state. And at this time the peoples of Indo-Europe were no more than nomadic tribes pushing their way from the East of the Caspian Sea into the fertile valleys of the two rivers, Tigris, and Euphrates, and over into Europe. The countries of particular interest are Egypt and Babylonia, which were later followed by the Assyrian and Persian empires, with their militaristic organizations. A detailed account of the Oriental countries belongs rather to the study of history than to that of politics. It is nevertheless necessary, in tracing the civic development of continental Europe, to note the various contributions made by the leading countries of the near Orient.

In contrast to the static conditions found in Europe from about 4000 to 3000 B.C., man had made substantial progress along social and political lines in Oriental countries. Within this time he had invented an alphabet, which made permanent intercourse possible, had learned the use of metals, and developed the art of commerce, all of which were practically unknown by the peoples of Europe and without which an advanced state in political organization was impossible.[1] As a result of the social progress in the Eastern countries, a corresponding advance appears in political institutions.

By 3400 B.C. the people of Egypt had long since passed through the various stages in civic association, such as the tribal state, the city kingdom, the confederation of numerous cities into larger organizations, and later had accomplished the formation of two large kingdoms. These,

[1] J. H. Breasted, *Ancient Times* (Ginn & Co., 1916), pp. 32–34.

in turn, united into one nation, which held sway for many years and extended through the period known in history as the Pyramid Age, 3000 to 2500 B.C. Here are found for the first time several millions of persons united politically under a centralized government executed by a single ruler with a body of officials responsible to him. After a time, however, this unified government, unable to hold together, was followed by a feudal age based on conquest, about 2000 B.C., when the king granted lands to nobles for reciprocal favors. Still later came the great military empire, which was extended until a large part of the Oriental world at that time was subdued and brought under the rule of the first great political dominion.

Similar progress in political development, but on a smaller scale and of a less enduring character, was made at a later date in Asia, chiefly by the nations of Babylonia and Assyria, and also in Asia Minor by Persia.

The city-kingdoms of western Asia, among which was Babylon, were brought in time to a position of co-operation and unification under the leadership of Sargon, 2750 to 2550 B.C. A great nation evolved with the union of the states of Sumer and Akkad, and survived for a number of centuries, when it was finally followed by the powerful and influential nation with Babylon as the center, and from which the subjugated and politically organized territory derived the name of Babylonia. To this period belongs the first codification of ancient laws, which, through the efforts of Hammurapi, about 2100 B.C., was so thoroughly accomplished that, in addition to the advantages afforded to the people of that time, it furnished a precedent from which future civilizations have profited. Judging from the content of the laws which have been constructed from the fragments that remain of the Babylonian legal customs and procedure, everything points to an advanced state of civilization based upon a unified legal system. All the important human relationships were provided for, and laws bearing upon family ties and responsibilities,

upon the art of commerce and of credit, upon contract and an elaborate form of conveyance, and an extensive banking system, were well formulated and executed. The exercise of judicial functions was primarily in the hands of the priesthood, and in the administration of justice the approval of the principal god of the country or of the ruling sovereign was evoked. However, the nature and extent of the laws, as well as their codification, represent a recognized legal basis for political organization far in advance of anything attained up to that time.[1]

To Assyria belongs possibly no other credit politically than that at her height in power and influence as a nation, 750 to 606 B.C., she represented the greatest military organization which had as yet been set into operation. The numerous districts and provinces and subject territories, though ruled over by local governors and kings, were under the powerful control of the central military machinery, which in time sapped the vitality and brought about the decline of Assyria.

Though the first form of provincial government was established in Assyria, the Persian Empire—about 530 to 330 B.C.—carried this form of government to a greater degree of perfection. Here, provinces, or satrapies, enjoyed a certain amount of local autonomy while still subject to the central authority of the king, to whom taxes were due and, in times of war, allegiance on the part of all men bearing arms. The central government, on the whole, was just and considerate of the rights of its subjects, but the people had no voice in its management, and in spite of their independence in their local affairs they were essentially a part of a great military organization.

To the Orient, then, civilization owes the achievement of definite and systematic political organization under one ruler, whose greatest asset, however, was frequently his military supremacy. There were in these nations, never-

[1] G. C. Lee, *Historical Jurisprudence* (The Macmillan Company, 1900), chap. i.

theless, no political freedom and no citizenship such as we understand the terms in modern times. In the Oriental countries, the rule of the king was unquestioned, and the individual did not share responsibility in political affairs. With the decline of the kingdoms of the Orient, the further development of civilization and the advancement of political institutions passed from the East to Europe.

The chief routes by which Oriental political institutions were carried into Europe were: first, by water, the highway being the Mediterranean Sea, from Egypt to the islands of the Ægean Sea, especially to the island of Crete; and, second, by land, through the valleys of the Euphrates and Tigris rivers into Asia Minor, and thence to the mainland of Europe. Chief among the islands of the Mediterranean Sea which were to receive the benefit of Egyptian culture and political achievements was Crete. A unique civilization developed on this island, which greatly influenced and stimulated the life of the Greeks, the first of the European nations to rise into prominence.

Contributions of Greece.—The Greeks, a branch of the Indo-European race, leaving their old nomadic life on the grass plains of the north, very probably along the eastern part of the Caspian Sea, poured down upon the peninsula and the islands of the Ægean, and took possession of this part of southern Europe during the period from about 2000 B.C. to 1000 B.C. Here they came in contact with the superior culture and mode of living of the Cretans. After this invasion the Cretan civilization disappeared, but not until the Greeks had appropriated a sufficient amount of it to form a basis for the culture and institutions which they later developed. With them, the Greeks brought some of the elements of their primitive forms of civic association, which, when grafted upon the remnants of the civilization they had overriden, developed into the highest political institutions that had thus far been established.

Their original organization consisted of loose groups of families, which formed clans or gens differing greatly in

size, but recognizing the oldest male descendant of the forefather as the clan elder or chief. A common kinship and the worship of a common ancestry formed the main bond of union. In time clans or gens united into phratries or brotherhoods. These in turn joined with other phratries, which resulted in the formation of tribes. The idea of kingship was very likely borrowed by the Greeks from the form of government which they found existing on the islands of the Ægean Sea at the time of their invasion. Though the chief was the recognized head of the tribe, important matters were decided by a council of old men. The practice prevailed also of calling together an assembly of all arm-bearing men to discuss the advisability of waging war or of moving on to other places of abode. Retaining these primary elements of civic control—chief, council, and assembly—as the tribes joined and settled permanently in southern Europe, the Greeks evolved a form of government characterized as the city-state, and similar to the political organization of the Oriental nations.

As political development progressed in Greece, the city-states came to differ among themselves as to their internal organization. In some, sovereignty is found to have been vested in a direct democracy where every free citizen had an equal voice; in other states, the ultimate power was placed in a restricted oligarchy; and in still others, absolute authority was usurped and held by tyrants. In fact, the majority of the Greek city-states passed through all of these various stages at some time during their existence. In Athens, by a series of reforms, the power of the aristocracy was reduced, and most of the political functions were transferred to an assembly comprised of free citizens. But at best the Greek democracies were little better than oligarchies, for about three fourths of the population were slaves. The free citizens constituted the small leisure class who did no disagreeable work but devoted their time to government, fine arts, and the refinements of life. Although a comparatively small number participated in the active

duties of government, nevertheless, the Athenian constitution represented at that time one of the greatest advances in the direction of popular government. The Athenian ideals are very well summarized in the memorable oration of Pericles.

An essential characteristic in common among all the city-states was that each city was inherently entitled to an independent existence, with the full right to regulate its external relations with other cities. To the Greeks the political ideal was the city; hence the notion of union with other cities was repulsive. This demand for self-realization in the management of internal affairs and external relations with other city-states led in large part to the jealousies, difficulties, and narrow self-centered interests which arose whenever the city-states attempted to confederate. Thus, the citizen was taught to regard himself not as a Greek, but as an Athenian or as a Spartan, and from this narrow patriotism arose the many difficulties and jealousies when the loyalty and the local interests of one city were pitted against the loyalty and local interests of another. The relations of these city-states with one another were determined primarily by considerations of self-interest and security, which took an organized form in various leagues or amphictyonies. The independence and separateness of the Greek city-states were in part overcome by the attempt of a few cities, such as Athens and Sparta, to attain a supremacy over the surrounding cities.

But owing to the inability of the Greek city-states to forget their local differences and jealousies, the Hellenes were never able to unite into one great nation. Such temporary federations as the Achæan League and Bœotian League united groups of cities for a short period, only to have them separate again for an independent existence as a result of jealousies and misunderstandings which led to frequent civil wars.

Though the Greeks derived the idea of centralized power vested in a king from the Orient, they obtained through the

participation of citizens in the political affairs a degree of freedom unknown to the peoples of the East. They failed, however, to develop the principle of representation, and the Greek instinct of separateness finally refused to admit either subject or allies to a common franchise. Although government in Athens and in other Greek cities was democratic in form and based upon the activity and interest of its free citizens, and although great advances were made in the fields of art, literature, science and philosophy, nevertheless, Greece was unable politically to overcome the influences of particularism and decentralization, and finally succumbed to the devastation of internal warfare and to the virile strength of her rising neighbor, Rome.

Contributions of Rome.—While the Greeks were individualistic by nature and lent themselves to philosophy, art, and the speculative sciences, the Romans, in contrast, were practical, well disciplined, and law abiding. After Rome had passed from the village stage into the city-state, it was only natural that, through her aptitude for developing political and legal systems, she should extend her control and jurisdiction over the Italian state and ultimately over a world state.

Like Greece, Rome possessed in her early political organization the threefold division of king, council of chiefs, or senate, and popular assembly, or *comitia curiatia*. But the king in the Roman state had greater power than had the king of a city-state of Greece. The former had absolute power over the citizens and in calling together the senate and popular assembly. The assemblage of *curias* was for the purpose of hearing the king's commands rather than of expressing their will, whereas the senate acted chiefly in an advisory capacity. During the regal period, the spirit of subjugating, federating, and Romanizing the outlying provinces through legal control dominated political life.

When the power of the king weakened, Rome entered her second period of political development, that of the Republic. The administrative powers formerly exercised

by the king were now in the hands of a body of men known as consuls, censors, and prætors. And though legislation was still nominally vested in the assembly, it actually rested with the senate, whose consent was necessary to make legislative acts effective. In fact, the senate became the chief source of political administration in Rome during the period of the Republic. Composed of nobles, the senate was aristocratic and its power absolute. Through the struggles which followed between the plebs and the patricians and later between the rich and the poor and between Italy and the outlying provinces, political control in Rome fell into the hands of a few powerful military leaders. Thus the foundation was laid for the Empire with the centralization of power in the hands of a single ruler. Though the senate and assembly were retained, their powers were in large part absorbed by the Emperor. In fact, the Emperor became the source and agency of all legislative and administrative powers. Under the leadership of capable Emperors, the Roman world, comprising a territory "as large as the United States with a population of one hundred millions, rested in the Great Roman Peace for nearly four hundred years. Never, before or since, has so large a part of the world known such unbroken rest from the horrors and waste of war."[1] Nevertheless, even during this period of peace, Rome was a military oligarchy and the people of the provinces were held largely as slaves and exploited accordingly. Few aliens were given the right of citizenship and then only as the power of the Romans weakened.

During the reigns of weak emperors, who experienced difficulty in administering the political affairs of the numerous provinces, came a disintegration of the strong and efficient organization established by the former emperors. Then followed a century of revolution and disorder which culminated in the establishment of an Oriental despotism under Diocletian.

[1] W. M. West, *Ancient History* (Allyn & Bacon, 1902), p. 400.

While the political power and control of the Empire steadily declined, the influence of Roman law and institutions was passed on as a permanent heritage to mankind by the codification of Roman Law under the direction of the Emperor Justinian. The Corpus Juris Civilis was the result of the growth of rudimentary legal ideas which were brought together in the code of the Twelve Tables, the development of which was continued through the thorough work of the prætors sent out to govern the Roman provinces. In the discharge of their duties the prætors depended, as a general rule, for counsel upon the jurisconsults, who condensed their learned and subtle opinions. These were compiled and put in permanent form under the title *Responsa Prudentium* and represent the fruits of exhaustive research into almost every branch of human knowledge. Thus was built up an artificial body of equitable jurisprudence, a scientific law literature, whose growth occupies a period beginning 100 B.C. and ending 250 A.D., a period enriched by the works of Capito, Labeo, Papinian, Paulus, Gaius, Ulpian, and Modestinus.[1]

The work of the great jurists, transformed by the principles of reason and equity embodied in the Stoic philosophy, along with the decrees of the emperors, was put into enduring form in the Corpus Juris Civilis. This code was absorbed by the law of the Teutonic tribes of the north as they poured in upon and took possession of the disintegrated empire. For many centuries the Roman law guided the Church in its efforts to establish peace and order out of the chaotic conditions which prevailed throughout the middle ages. Later, the study of Roman law was revived, and, with the establishment of order by the national states, Roman law was used as a basis to form the codes under which a large part of the people of continental Europe are now living. The principles of the Corpus Juris have also been appropriated and put into force in most of

[1] Hannis Taylor, *The Science of Jurisprudence* (The Macmillan Company, 1908), chap. iii.

the South American countries, in Louisiana, in Quebec, and in South Africa, until a large portion of the world is governed by law whose principles and practices are determined in accordance with those of the Roman Code of Justinian. Thus, by means of a highly organized and efficient empire, and by means of the system of law embodied in the Corpus Juris Civilis, Rome has profoundly influenced the political institutions of modern times.

Feudalism.—As the political control of Rome weakened and the uncultured tribes of the north overran southern Europe, a condition of political anarchy prevailed, in which the restraining influence of the Church and the power wielded by the great barons alone tended to preserve a semblance of peace and order. It is not surprising that the peacefully inclined and intellectually minded of this period entered the monasteries, which were protected from the rigors and hardships of political turmoil and perpetual warfare. Neither were the lawlessness and strife which were indulged in by the pirates and marauders and encouraged by the barons in preying one upon the other conducive to the development of commerce and industry or to the establishment of a settled political order.

The Teutonic tribes from the north did not have any fixed form of political organization. The tribe, as in early Greece and Rome, was the unit of political control, and at times these tribes united to form temporary confederacies. Among the political contributions of the Teutons were (a) recognition of the great importance of the individual, with emphasis upon his rights and privileges as opposed to the control of the state; (b) a new type of popular assembly with the beginning of the modern representative idea; (c) a self-developing law, later systematized in the Teutonic codes and in the growth of the common law of England. As the tribes began to occupy a territory with fixed geographical boundaries and to live in accordance with established laws, the mediæval state was formed. Out of this condition of political chaos of the early middle

ages evolved the mediæval king or monarch. By combining the powers wielded by the emperors in Rome and some of the authority exercised for many centuries by the popes and bishops, the kings managed gradually to suppress feudal disorder and anarchy, and to create therefrom a power strong enough to establish unity. In this manner were laid the foundations of the mediæval state. When the idea of the personal relation of the Teuton to his chief became blended with the Roman concept of control over a particular portion of land, the tribal lord was changed into the territorial sovereign, who asserted and maintained political and economic control by means of a military caste. The subject population went into the monasteries or became serfs attached to the land, the latter being exploited by the knights and soldiers. This transformation of tribal lords into territorial sovereigns was accomplished first in France and England, and was gradually completed in the other countries of western Europe.

For a long time, the idea of a universal dominion, such as that wielded by Rome, continued to hold sway over men's minds. After the Roman Empire disintegrated, the Catholic Church, under the direction of the Papacy, appropriated the idea of a unifying power, and aimed to hold Europe together under an ecclesiastical dominion. "The Roman Empire and the Roman Catholic Church were, according to mediæval theory, two aspects of a single Christian monarchy whose mission it was to shelter beneath its wings all the nations of the earth." With the expanding powers of the Church and its system of canon law, the rising monarchs came into clash with the popes and their representatives until by warfare and civil strife the kings established themselves as supreme in political and in religious matters. Nevertheless, the mediæval world-empire lived on as an idea until the beginning of the nineteenth century. But, by rendering the states politically independent, the Peace of Westphalia, in 1648, temporarily ended the effort to create a world state. "That

peace set the final seal on the disintegration of the world-empire at once of pope and emperor, and made possible the complete realization of the doctrine of Grotius, the doctrine of the sovereignty of states."[1]

The National State

The national state had its origin in the strife for supremacy among the barons. Some forged ahead of others and by means of war, intrigue, negotiations, and every device known to selfishness and adventure managed to strengthen their power and to establish, under the title of king, their dominion over large areas. As the champion of the rising spirit of racial unity, the monarchs appeared as the protectors of the rights of the lower classes against the grasping powers of the manorial lords.

Since the downfall of feudalism, political development in Western Europe has come by means of and through the agency of the national state. Through wars and resulting conquests, through diplomacy often based on cunning and trickery, and through peaceful expansion along commercial and industrial lines, the earth's surface has been almost entirely appropriated and settled by a small group of such national states. For a long time it was thought that it was better to use force and trickery than to deal openly and aboveboard, and that the prince or ruler need not be scrupulous about fulfilling his promises when it was found convenient not to do so. In the state, the law of self-preservation prevailed and no scruples of honesty or right were to be regarded when self-interest dictated otherwise. In the course of time, however, settled customs and practices grew up in the exchange of and in the conduct of diplomats, in the reciprocal rights and privileges granted to citizens, and even in the rules and regulations which were supposed to be followed in the conduct of warfare. These rules and regulations have grown into a generally

[1] T. A. Walker, *The Science of International Law* (London, 1893), p. 57.

accepted body of customs which form the basis for modern diplomacy and international relations.

The modern state is built on the concept of nationalism, which assumes that each state is sovereign—that is, independent of every other state. Nationalism is based primarily on two concepts. The first is comprised in the notion of benevolent despotism whereby a people aims to gain territory and extend its dominions for the purpose of political control and economic domination. Such domination in the conduct of the affairs of modern times is known as commercial imperialism. The second concept is the outgrowth of the self-consciousness of people who are more or less homogeneous in blood, language, religion, and custom. This concept is represented to-day in the doctrine of the self-determination of nations. Current opinion usually accepts the nation as the best and highest possible development in the political world. In the words of a noted exponent of this theory, "nature has decreed that the struggle for survival shall be in groups. The national group is the only one suited to cope with conditions."[1] One of the fundamental principles of nationalism is that each state regards itself and its ideals as superior and thinks that it has a peculiarly important mission to perform. Each state believes that its highest duty is to survive and to spread the ideas and ideals which are regarded as its peculiar heritage.

Modern national states are conceived as involving certain essential rights and duties. The first right is that of existence—*i.e.*, the right of self-preservation and defense. This right is the basic principle of state existence, and justifies the taking of such measures as may seem necessary for the safety and defense of the state itself and for the preservation and integrity of its territory. To this right is attached a corresponding duty to respect the existence and the rights of other states. The second right is that of

[1] *Cf.* Karl Pearson quoted in Edward Krehbiel, *Nationalism, War, and Society* (The Macmillan Company, 1916), chap. i.

sovereignty or independence. This right, so far as external relations are concerned, is subject to many limitations as a result of comity, agreement, and treaties on international affairs. Such limitations are especially important in semi-sovereign states, neutralized states, or states under some form of protectorate.

The following rights are based upon that of sovereignty and independence:[1]

1. To establish, maintain, and change the form of government. This involves the right of revolution.
2. To enter into treaties and alliances.
3. To make and change laws and to see to their administration.
4. To exercise exclusive jurisdiction over all persons and things within its territory, subject to certain exceptions applicable to foreign sovereigns, diplomatic agents, and public ships.

These rights imply certain duties, such as the duty of nonintervention in the affairs of other nations and the duty to respect the rules and customs of international law. Forcible intervention, which was rather common in the former relations of states, is now usually condemned and is no longer justifiable, unless in cases where crimes have been committed or where international interests of great importance are endangered.

The third right of a national state is equality before the law. As expressed in the terse words of Chief-Justice Marshall, "Russia and Geneva have equal rights. It results from this equality that no one can rightfully impose a rule on another. Each legislates for itself, but its legislation can operate on itself alone."[2] While, as a matter of fact, states like individuals are not equal, and though great states wield much greater power and influence in international affairs than do smaller states and often disregard the rights of the weak and smaller states, neverthe-

[1] In the preparation of this summary of the rights of states, we are indebted to A. S. Hershey, *The Essentials of Public International Law* (The Macmillan Company, 1912), chap. ix.

[2] The Antelope (1825), 10 Wheaton, 65 at 122.

less, the ideal of equality is one toward which the states are approaching and one which, it is to be hoped, will become of increasing importance in the future.

The right to respect is the fourth fundamental right of a state. Failure to observe this right is regarded as an affront to the dignity of the state. It involves respect for the state's personality as represented by its sovereign, warships, and diplomatic agents, and is evidenced by customary honors and marks of respect and also involves respect for its civil or legal personality.

The fifth right of states is that of mutual commerce or intercourse, including especially diplomatic and commercial relations. This right is subject to important limitations, but it is a necessary condition if a state is to participate in and to take its part in the family of nations.

All of these rights involve important duties and responsibilities. They demand, as expressed by Daniel Webster, that

> every nation, on being received, at her own request, into the circle of civilized governments, must understand that she not only attains rights of sovereignty and the dignity of national character, but she binds herself also to the strict and faithful observances of all those principles, laws, and usages which have obtained currency among civilized states.

Certain corollaries are frequently conceived as growing out of nationalism.[1] Thus, it is contended that expansion is a part of the mission of a nation. The expansion of the frontiers in the acquisition of new territory is often regarded as a necessity. And national necessity is frequently considered as taking precedence over promises, agreements, and international rules. Furthermore, each state is conceived as rivaling other states in trade, commercial relations, and diplomatic affairs. Back of these corollaries is the contention, widely maintained, "My country, right or wrong," by which the individual is expected to support his government whether or not he approves the course adopted. Certain results have followed from the acceptance of these

[1] Edward Krehbiel, *Nationalism, War, and Society*, chap. ii.

corollaries. In diplomacy, it has often meant the adoption of the policy that the end justifies the means and that everything is conceded as right so long as it redounds to the national power and honor. In international affairs, it has set nation against nation, with war as a necessary part of the national life. Along with these rather extreme notions, which have often rendered the concept of nationalism odious, have come many positive contributions in the development of a fine spirit of patriotism and sane rivalry and in the growth of peaceful relations which have established the basis for a growing internationalism.

International Law and Progress Toward a World State

The weaknesses of nationalism, however, such as the dominance of self-interest in the conduct of diplomacy, the difficulties and uncertainties of commercial warfare, and the frequent outbreak of war with its horrible aspects, have led men to turn to the ideal of an international or world state. The basis for the world state has been provided in the settled rules and customs by which the nations, through the channels of diplomacy, settle controversies and conduct common affairs, and in the formulation of a body of rules and customs known as International Law. Among the principal conventions and agreements by which these rules and customs have been formulated and codified are:

The Declaration of Paris, 1856.
The Geneva Convention, 1864.
The Declaration of St. Petersburg, 1868.
Conference of Brussels, 1874.
Hague Peace Conference, 1899.
Second Geneva Convention, 1906.
Second Hague Conference, 1907.
Declaration of London, 1909.

Furthermore, the peaceable settlement of international difficulties has been accomplished in large part by the develop-

ment of the practice and procedure of arbitration. The United States has taken a leading part in encouraging the submission of questions to arbitration, and by the Taft-Wilson-Bryan treaties the nation is committed to arbitrate practically all difficulties which arise with the majority of the countries with which we have diplomatic relations.

But owing to the fact that international law is made in large part by treaties and diplomatic agreements, as well as by the prize courts of each nation, and that its enforcement is left entirely to the separate nations, an effort has been made to establish international tribunals with an effective organization and adequate powers to give sanction to international rules and principles. For this purpose efforts have been made to establish a permanent court of arbitration with well-defined modes of procedure in the settlement of controversies, and an international prize court for the determination of the difficult questions of prize law. And these steps have all been preliminary to the effort to realize the ideal of a world state.

Though much progress in the direction of an organization for a world state had been made prior to 1914, the Great War has resulted in at least two contributions to this general movement, which are, on the whole, the most noteworthy advances yet made. These were the administrative agencies established to secure unity in the conduct of the war among the Allies and the covenant for a League of Nations. To effectuate a real unity in plans and administration, there was established, as a result of conferences at Versailles, a group of agencies which made for unity of action among all of the Allies in the conduct of many phases of the war. The most important of these bodies was:

The Allied Maritime Transport Council, with subordinate bodies, such as

(a) The Food Council.
(b) Munitions Council at Paris.
(c) Program committees dealing with raw materials.
(d) The Petroleum Conference and the Coal and Coke Committee.

(e) The Interallied Council on War Purchases and Finance.
(f) The Allied Blockade Committee.[1]

Over and above these and many other subordinate bodies was the Supreme War Council, organized under what is known as the Rapallo Agreement, whose mission it was to watch over the general conduct of the war, to prepare recommendations for the decisions of the respective governments, and to report on their execution. Here, in the words of Premier Lloyd George,

> we have had provided the machinery of the League of Nations, where nations have come together to set up a complete machine which is a clearing house not merely in military matters and in naval matters, but for financial, for economic, for shipping, for food purposes, and for all the other things that are essential to the life of the nations. All these matters are raised there and discussed there. Information on them all is classified there and interchanged; and, still more, the machinery is there not merely for registering or recording, but for decisions which affect all these nations.[2]

The real effects and results of this plan of co-operative action will not be known for a long time; but it is now clear that by this plan one of the chief defects in international organization as an effective method for administrative unity in war has been overcome and the machinery for its successful operation has been provided.

The Covenant for a League of Nations

All of the steps thus described are but preliminary to the actual progress in the effort to formulate a world state such as that undertaken at the Paris Peace Conference in the covenant for a League of Nations. This covenant provides for an Executive Council consisting of nine members representing five great powers and four other states, an assembly to consist of representatives of the members of the League,

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[1] *Bulletin, A League of Nations*, vol. i, no. 7, "The Supreme War Council" (October, 1918), pp. vi–viii, published by the World Peace Foundation, Boston.

[2] *Ibid.*, p. 348.

and a permanent secretariat. The Council and Assembly are authorized to deal with any matter "affecting the peace of the world." It is made the duty of the Council to formulate plans for the reduction of armaments, to control the private manufacture of munitions, and to give advice for the protection of members against aggression. The Council is to act, likewise, as a board of conciliation for the settlement of disputes and is expected to prepare a plan for the establishment of a Permanent Court of International Justice. To aid the Council in the preparation of data and in the rendering of advice, commissions are to be established as follows:

Military and Naval Commission to advise on armaments and the traffic in munitions.

Mandatory Commission to advise with powers acting as mandatories over colonies.

International Bureau of Labor to secure fair and humane conditions for labor.

The members of the League agree to acquaint one another with information on military affairs; to defend one another's territorial integrity and independence against external aggression; to regard any threat of war as a matter for the consideration of the League, and to refer disputes not adjusted by diplomacy to be settled by (a) arbitration, (b) commission of inquiry, (c) permanent court to be established hereafter; and, finally, to make no war in any case until three months after awards or recommendations are announced. Members of the League agree to join in bringing pressure to bear on a state which refuses to abide by the covenant by (a) an economic boycott, (b) cessation of all intercourse, (c) blockade, and (d) use of military and naval forces. The colonies and territories left unprotected as a result of the war are to be placed under mandatories which are expected to act under advice and make regular reports to the League.

"January 16, 1920," said Léon Bourgeois, chairman of the Council of the League of Nations at its opening "will

go down to history as the date of the birth of the new world." That this prediction is in process of fulfillment appears from the progress already made in organizing and getting under way the machinery for a League of Nations. An organization committee formed to work out a plan for the functioning of the League recommended the formation of the following sections, a number of which were soon organized and ready to begin work:

1. Political.
2. Legal.
3. Economic and Financial.
4. Administrative Commissions and Minority Questions.
5. Transit and Communications.
6. Information.
7. Mandates.
8. International Bureaus.
9. Regulation of Treaties.
10. Social Questions and Health.

The Council of the League has carried out a number of the duties allotted to it under the covenant and has undertaken others such as the repatriation and resupplying of prisoners of war in Siberia and the adoption of measures to prevent the spread of typhus and cholera in eastern and central Europe. Among the most important steps taken was the appointment of a committee to prepare a plan for a Permanent Court of International Justice to be submitted to the Council and Assembly and then to the member nations.

The Council has been participating in the settlement of many matters in the reconstruction of Europe, and the Assembly at its first meeting in Geneva, Switzerland, in November, 1920, discussed and passed upon numerous projects to aid co-operation among nations and to dispel international misunderstandings.[1]

[1] See Reports on a League of Nations by the World Peace Foundation, 40 Mt. Vernon St., Boston; Arthur Sweetser, *The League of Nations at Work* (The Macmillan Company, 1920); also *Official Journal of the League of Nations.*

Whether the steps thus far taken in the establishment of the League of Nations will serve as a basis for a permanent international organization remains to be decided. But whatever the verdict may be in this regard, a series of precedents have been inaugurated which will render easier and more effective some permanent form of organization for greater co-operation among nations.[1]

The Political State and the Problem of Industrial Democracy

Coincident with the development of the national state and progress in the direction of an international state has come the growth of the democratic ideal in the management of public affairs in the individual nations. Government, which was originally conceived for and by a small class in society, has come to be a matter of general public interest and concern. The development of this interest has centered very largely in the emergence of representative bodies and in the strengthening of their powers. When the nobles and wealthy landowners of England combined to humiliate King John, and when Simon de Montfort called the first parliament in 1265, the basis was established for the representatives of various classes to consult with and advise those who were charged with the responsibilities of governing. Parliament at first merely served as a body to petition the king to redress grievances or to protest against some royal order. But these advisory functions were greatly extended under weak kings, and even the public acts of strong kings were rendered less effective through the exercise by Parliament of two positive duties, each of which resulted in adding materially to the authority and prestige of representative bodies. These were the right to pass upon and approve or disapprove new taxes and the right to criticize and eventually to force the removal of the king's min-

[1] *Report on the present status of the League of Nations and the prospects of a real world state.*

isters. These rights, when contested by the Stuart kings, led to revolution and to the recognition of the ultimate control of government by the representatives of the people in Parliament. When, soon afterward, the king acceded to the practice of dismissing Ministers not in harmony with the lower chamber, or House of Commons, a representative body in control of an executive committee known as the Cabinet became the governing authority of the English nation. The representatives of various classes in the government came to be regarded as a necessary requirement for popular participation in public affairs. The French Revolution in Europe and the American Revolution tended to spread the representative idea, and it took firm hold in the written constitutions of the United States, and has been made a feature of every constitution since adopted. A representative body of one or two houses (and with but few exceptions the bicameral system of England has been followed) is now an important feature of all of the leading governments of the world.

With the emergence of the representative idea, and coincident with it, has come a gradual widening of the basis on which representatives have been selected. Representative bodies at first were comprised only of members selected from the higher nobility. When the lesser nobles were added, the former classes withdrew to themselves and formed the upper chamber, or House of Lords. But members of both chambers were selected by and represented a very small percentage of the population. In England, the number who participated in this selection was astonishingly small prior to 1832. By a series of acts, the electorate was extended until now, with few exceptions, every man and woman above a legal age limit is permitted to participate in the selection of representatives to Parliament. Similar extensions of the electorate have taken place in practically all countries where democratic ideas have prevailed.

Not only has there been an almost universal acceptance of the representative idea in government and the correla-

tive expansion of the electoral basis of selection, but a new development promises to affect profoundly the former concept of representative government and to place increasing duties and responsibilities upon the greatly expanded electorate. This new movement is known as direct government. Chief examples of it are to be found in governments such as Switzerland and many American states where laws, rules, and regulations are referred directly to the voters and public control may be exercised without participation in the act by an intermediate representative body. Direct government is illustrated also in countries with Cabinet government, where an increasing number of public issues are referred to the electorate. Though direct government does not mean that legislative bodies will be either abolished or seriously weakened, it does mean that, on fundamental questions of policy, legislative bodies will more and more fall back upon and aim to carry into effect publicly expressed convictions determined by voters on specific issues referred for public approval or disapproval.

The growth of political democracy as developed in the eighteenth and nineteenth centuries has depended largely upon the ability of different classes to control the government. To the aristocracy based upon birth and education was added an aristocracy of wealth as an outgrowth of the industrial revolution and the consequent expansion of commercial interests. And the government, despite the principle of representation and the extension of the suffrage, remains to a large extent under the control and direction of special groups and interests. As each group of society has gained in numbers and cohesive power, a desire has been manifested by those governed for a share in the control and management of government. One of the most recently organized and increasingly self-conscious groups is that comprised in the various divisions and branches of organized labor.

In all countries there has been developing a class consciousness on the part of the laboring classes to secure an

increasing control of the government, and to seek its protection in industries and in the improvement of the general living conditions of the workmen. The World War, with its demands on labor and with the concessions made to labor in order to speed up war machinery and to assure a successful outcome, has aided the struggle for the democratization of industries and for an actual share in their management as well as in the government itself. Though in the League of Nations and in the Treaty of Peace an effort has been made to solve some of the problems of the national political state; and though the world is being reconstructed on the principles of statehood and nationalism, this important issue—the problem of industrial democracy—is also presenting itself to the people of all countries. It seriously affects the status of the national political state and the institution of private property, on which, to a large extent, the political state is constructed. Democracy in government, as it is coming to be understood to-day, seems to mean more than political democracy. It is being interpreted to include as well the idea of industrial democracy. Just how far this movement will be carried during the period of reconstruction in the various nations time alone will tell. European countries have begun to define democracy in terms not only of political participation in the government, but in terms of how far that political participation will enable the electorate to control the various phases of their industrial life, including the means of production, distribution, and exchange. There can be little doubt, according to a close student of the process of governmental evolution, that "the world is about to enter upon a struggle on the part of the common people for industrial democracy comparable in all essential respects to the struggle for political democracy that characterized the nineteenth century." Chief among the problems of modern governments are, then, the development of the methods and agencies of control, which have been the outgrowth of the progress toward political democracy, and provisions

for greater and more effective participation in public affairs by those who perform the world's work.

SUPPLEMENTARY READINGS

H. F. Osborn, *Men of the Old Stone Age* (Second Edition, 1916), (Charles Scribner's Sons), gives a very interesting account of the contribution of the sciences of archæology and anthropology to our knowledge of the life of primitive man.

J. H. Breasted, *Ancient Times* (Ginn & Co., 1916), or some other standard history should be consulted on the contributions of the Orient and of Greece and Rome to modern politics.

G. C. Lee, *Historical Jurisprudence* (The Macmillan Company, 1900), gives a brief review of the growth of law from ancient times to the present day.

A. S. Hershey, *Essentials of Public International Law*, Chaps. I–IV (The Macmillan Company, 1912), and

C. H. Stockton, *Outlines of International Law*, Chaps. II–III (Charles Scribner's Sons, 1914), furnish a summary sketch of the growth of International Law.

F. C. Hicks, *The New World Order* (Doubleday, Page & Co., 1920), gives an account of recent developments along the line of international organization and international co-operation.

Bulletins on the League of Nations describing the organization of the League and its accomplishments are published by the World Peace Foundation, 40 Mt. Vernon Street, Boston.

CHAPTER II

THEORIES AND DEFINITIONS

Theories as to the Origin and the Development of Government[1]

In the preceding chapter the origin and the development of government were briefly explained, but the impelling force which led man to unite his efforts with other men to accomplish a common end remains to be considered. Various theories have been formulated and advanced by political thinkers as to the incentives which have drawn men together and have led them to submit to a common regulation of the various relationships which individuals bear to one another. Chief among the theories which have been advanced are (a) the instinctive theory, (b) the force and necessity theory, (c) the divine-right theory, (d) the social-contract theory, (e) the evolutionary theory, and (f) the economic theory.

The Instinctive Theory.—Since the time of the Greeks there have been those who have traced the origin of political institutions to the natural instincts of man. Aristotle, one of the first exponents of this theory, presented the view in the first book of *The Politics* that man is by nature a political animal. While the state is an association of human beings and has been preceded by the family relation and the village, the instinct for political association

[1] Some of the classics on government which present the foundation for modern political theories and which should be read are: *The Republic of Plato*, *The Politics of Aristotle*, *The Prince* by Machiavelli, *Civil Government* by Locke, *The Leviathan* by Hobbes, *The Spirit of Laws* by Montesquieu, and *The Social Contract* by Rousseau.

is, he maintained, inherent in man. All forms of association, simple and complex, are but the outward expression of this inherent quality. Cicero also set forth the same conception in his Commonwealth. The first cause of an association of the entire people for the purposes of justice and utility, he thought, is not so much due to the weakness of man as to a certain spirit of congregation which naturally belongs to him. When a consciousness of mutual rights and duties existed in a community, it was thought that there likewise existed at that time the element necessary to create an organized state as an outward expression of this consciousness.[1] The universal instinct of human society is toward external organization of the common activities of man. Greek philosophers thus considered political authority as a "necessity arising from the social life of man as existing in and of and for itself and as determined by the very nature of things." To them the essential psychological element of unity in action existed subjectively in the minds of people and became objective when expressed in laws and political institutions. But this subjective idea of unity was thought to have been the essential element of the state and necessarily antedated the objective bond as manifested in the body politic.

The instinctive theory has an element of truth which has led to its acceptance and exposition by certain modern political thinkers.

The Necessity and the Force Theories.—To other thinkers the necessity of self-protection appears to have been the primary motive for the formation of political societies. The necessity theory recognizes that men, because of their many wants, are mutually dependent, and are compelled by them to seek aid through political association. Plato in *The Republic* says "that owing to our many wants, and

[1] For a survey of the development of Political Theories the scholarly work of Prof. W. A. Dunning is recommended, *Political Theories, Ancient and Mediæval* (The Macmillan Company, 1902), *Political Theories from Luther to Montesquieu* (The Macmillan Company, 1905), an *Political Theories from Rousseau to Spencer* (The Macmillan Company, 1920).

because each seeks the aid of others to supply his various requirements, we gather many associates and helpers into one dwelling place and give to this joint dwelling the name of city." It was thought by other theorists that civic subordination was originally established by violence and submitted to under the pressure of force. Self-defense and aggression then occasioned the centralization of control in a common political agency whose power extended over a definite territory or community. Along with the concept of necessity as a basis for organized community life came the growth of the force theory, and with it the idea that might makes right. The best account of this theory is to be found in Machiavelli's *The Prince*, where force and expediency, as the prime motives in state control, are succinctly set forth.[1] Recent advocates of the force theory are to be found chiefly in Germany. To quote one of its influential expounders,

> force can be found only among people possessed of a strong vitality and of a progressive civilization. Progress makes for victory. If it were not for war, we should probably find that inferior and degenerated races would overcome healthy and youthful ones by their wealth and numbers. The generative importance of war lies in this, that it causes selection, and thus war becomes a biological necessity. It becomes an indispensable regulator, because without war there could be neither racial nor cultural progress.[2]

An expression quite common in German papers, articles, and books prior to 1916 was that "war is the most sublime and most holy expression of human activity." To these advocates of war "the ideal of perpetual peace is not only impossible, but immoral as well,"[3] and Germans have been constantly urged to combat the peace propaganda, arbitration at The Hague, and the regulation of international affairs by conventions. Thus, running counter to the agreements among nations, the German Army-Law Manual

[1] F. W. Coker, *Readings in Political Philosophy* (The Macmillan Company, 1914), pp. 173–185.
[2] F. von Bernhardi, *Britain as Germany's Vassal*, trans. 1914, pp. 110–111.
[3] H. von Treitschke, *Politics*, 1916, vol. ii, p. 599.

declared that the laws and customs of war must yield to the demands of military necessity whenever the observance of the law would prevent or hinder the attainment of the object of the war.[1] Although there are many advocates of the force theory at the present time, its significance seems to be declining before the principle of common consent and agreement as a more reasonable and fair basis for the adjustment of civic affairs.

The Divine-Right Theory.[2]—Probably no concept as to the origin of government has held so prominent and enduring a place in the political evolution of society as the divine-right theory. The basis for this theory can be traced to the period of development when the control of civic association was synonymous with the execution of what were considered by primitive peoples the dispensations of the deities. In the early history of the Orient can be found the idea of the divine origin of civic mandates, when the ruler was high priest as well as king and military leader. The foundations of the civic institutions of the Orient, as well as the despotism of those in authority, supposedly rested upon the divine sanction of the community god. In Oriental countries the divine will was evoked and executed by the king or ruler, who was looked upon as the spokesman of the tribal god.

The close union of priestly, civic, and military functions, likewise, existed everywhere in Europe in the earlier development of political institutions. Thus, in ancient times, government and religion were inseparably associated. And it was largely through the religious fear and superstition which the ancient peoples had for an unseen will expressed through what was supposed to be a divinely appointed agent that the barbarous elements of liberty and license in man were brought into check by a common agreement or political mandate.

[1] *The German War Code,* issued by the Committee on Public Information, War Information Series No. 11 (February, 1918), p. 3.

[2] J. N. Figgis, *Divine Right of Kings and the Divine Rule Theory* (Second Edition; Cambridge, 1914).

Alexander reinforced the idea of the divine right of rule when, during his series of conquests, he made a visit to the ancient sacred shrine in Egypt and claimed to have received there the divine sanction for the campaigns which followed in Europe as well as in Asia. Later throughout Europe further progress in political organization was effected on the theory of a close union of kingship with a divine being, just as had been the case with the despots of Asia. Support of the theory that the king or ruler obtained his power and authority from a divinity to whom alone he is responsible has continued throughout the ages.

Adherence to this idea was manifested by Charlemagne when he accepted coronation from the Pope of Rome and thus recognized a union of civil and religious authority. Such a recognition helped to restore order and political unity amid the chaos which prevailed throughout Europe during the later mediæval period. After the long and bitter struggles which followed between the Church and the state, the temporal ruler gained undisputed control over things temporal, while the Church was recognized as supreme over things spiritual. Although this contest ended by establishing the authority of the king as independent of that of the Pope, the former, whenever it was advantageous, still harked back to the divine origin of royal edicts. In the rise of modern nations, kings have often resorted to the time-honored theory that their power is an inheritance from God. Such was the case with the despotic rulers of England, James I, Charles I, and Charles II, and Louis XIV of France. In the words of James I, "that which concerns the mystery of the king's power is not lawful to be disputed; for that is to wade into the weakness of princes, and to take away the mystical reverence that belongs unto them that sit on the throne of God." Louis XIV held a similar idea as to the divinity of kingship and expressed it in the following statement, "It appears from all this that the person of the king is sacred, and that to attack him in any way is a sacrilege—kings should be

guarded as holy things, and whosoever neglects to protect them is worthy of death."

In modern times, conspicuous examples of nations whose rulers have claimed direct connection with a deity and divine sanction for royal authority are to be found in Germany and Japan, and in Russia until the recent overthrow of the monarchy. The divine right of kings, observes an authority on the constitution of Japan, "was carried to such an extreme in England that Charles I lost his head; but in Japan the divine right of the Emperor is acknowledged to a degree of which no Stuart ever even dreamed."[1] According to Prince Ito, "the Emperor is Heaven-descended, divine, and sacred; He is pre-eminent above all his subjects. He must be reverenced and is inviolable."[2] It is evident, then, that the modern government of Japan is based, to a certain extent, upon the idea of the divine descent of the monarch; and with the merging of the oligarchy into a single power, the reverence of the people for the throne has continued.

A more striking instance of the divine-right theory was the revival at Königsberg by Emperor William of Germany of the rôle of vice-regent of God on earth:

> My grandfather [said the German ruler], by his own right, placed the Prussian crown upon his head and again proclaimed it to be bestowed upon him by God's grace alone, and not by parliaments, assemblages of the people, or resolutions of the people; and that he saw in himself the chosen instrument of Heaven, and as such regarded his duty as regent and ruler. . . . Considering myself as the instrument of the Master, regardless of passing views and opinions, I go my way, which is solely devoted to the prosperity and peaceful development of our Fatherland.[3]

The relation of the force theory to the divine-right theory is expressed in the speech of Emperor William to the Royal Guard in 1898:

[1] E. W. Clement, *Constitutional Imperialism in Japan*, Proceedings of the Academy of Political Science, vol. vi, no. 3, April, 1916, p. 5. [2] *Ibid.*, p. 6.

[3] *The Outlook*, vol. xcvi (September, 1910), p. 53, "The German Kaiser and Divine Right."

> The most important heritage which my noble grandfather and father left me is the army. . . . And leaning upon it, trusting our old Guard, I took up my heavy charge, knowing well that the army was the main support of my country, the main support of the Prussian throne, to which the decision of God has called me.

The abdication of the German Emperor as a result of military defeat and the control of the revolutionary parties bid fair to eliminate the divine-right idea from German politics. In Japan, likewise, the trend toward parliamentary government is weakening the sentiment which supports the divine-right theory. Nevertheless, the theory of the divine origin of political authority cannot be ignored in the study of politics, however foolish or preposterous the extravagant claims of its proponents may seem.

The Contract Theory.—During the latter part of the Middle Ages and up to the early eighteenth century, a new theory was advanced as an explanation for the political association of man. This idea, known as the contract theory, presupposes an original state of nature. From this condition, individuals emerged into political organization by mutual agreement whereby they bound themselves to submit to an external authority. The theory was definitely formulated in continental Europe during the fourteenth and fifteenth centuries, and was later carefully developed and elaborated by Hobbes, Locke, and Rousseau. Each conceived a somewhat different notion of the contract through which political society was formed.

To Hobbes, man was essentially selfish and lived in a state of nature in which there was perpetual warfare of all against all.[1] Consequently, the individual was inclined to join his fellows in forming a common sovereign who might establish peace and order. The state was thus based upon a compact between individuals whereby each of them gave up a part of his own natural liberty in order that all might be protected by the strength of all. When a number of persons had so delegated their individual rights to a

[1] F. W. Coker, *Readings*, *op. cit.*, pp. 302–352.

common authority, a commonwealth was thought to be formed. The contract, once entered into, was regarded as eternally binding and the sovereign which was formed and in whom political authority was concentrated was absolute. To the people there was no alternative but to submit to this authority, for the right of revolution was forever lost and submerged in the original contract which created a political society. It may readily be seen that Hobbes became a champion of an absolute monarchy such as the Stuarts were trying to establish in England and Louis XIV was laying the basis for in France.

The state of nature, according to John Locke, was peaceful in character, and mankind was getting on fairly well without civic association.[1]

> The state of nature [said Locke] has a law of nature to govern it, which obliges everyone; and reason, which is that law, teaches all mankind who will but consult it, that being equal and independent, no one ought to harm another in his life, health, liberty, or possessions.

But the individual in the state of nature found it desirable, in order to secure better protection for his rights and liberties, to form a political association. The origin of government is, then, conceived by Locke as a compact wherein the individual voluntarily surrendered into the hands of a general authority certain rights and powers by which his remaining liberties and rights should be protected and preserved. The state is thus created to protect rights already in existence. Moreover, these rights remain in the individual even after the contract is formed and have the same binding force as in the state of nature. In other words, the governing power created is in no case absolute, but is limited by these rights. The power of the ruling authorities is a fiduciary one and, when abused, may be revoked by the people who granted it. The belief that government is thus based upon the consent of the governed, and that the right of revolution against an arbitrary and

[1] F. W. Coker, *Readings, op. cit.*, pp. 385–436.

abusive sovereign is an inalienable right—both of which are forcibly expressed in the Declaration of Independence —represent, to a great degree, the fundamental principles of the contract theory as expounded by John Locke. These principles were also embodied in large part in American state constitutions.

Rousseau began his *Social Contract* with the striking epigram, "Man was born free and everywhere is in chains."[1] Here was suggested the doctrine of a state of nature which he had previously developed—that is, that man lived in a condition of freedom and bliss, and that he lost much of his freedom as the conventions of society grew and as political authority was asserted over him. Although man is naturally free, Rousseau believed his freedom might be protected and even improved upon by the formation of a democratic political society. The problem with him was "to find a form of association which shall defend and protect with public force the person and property of each associate, and by means of which each, united with all, shall obey, however, only himself and remain as free as before." This difficult problem is solved by the formation of government based on the *volonté générale*, or general will. The general will is not always the will of a majority; it represents rather the will of those who conceive and work for the best good of the entire society. This general will brings into being the sovereign, which, resting upon the agreement and consent of the people, is regarded as inalienable and indivisible. Since it has its source and sanction in the voice of the people, there need be no fear of creating an absolute authority. According to this theory, the government and officers of the state are the mere agents of the sovereign, and they must look to the people for their mandate. In putting the authority of the people uppermost and in placing the sanction of government entirely upon their will, Rousseau formulated the democratic ideal which was embodied in the political

[1] F. W. Coker, *Readings*, *op. cit.*, pp. 479–513.

philosophy of the French Revolution, and which, through that great upheaval, profoundly influenced the growth of popular government in all countries.

The Common-Consent Theory.—In contrast with the force and divine-right theories, there has been a new development of the contract theory toward an ideal of government based on common consent. The ideal of common consent was formulated in the Declaration of Independence, where it was affirmed that

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable rights, that among these are life, liberty, and the pursuit of happiness. That to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed, that whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it, and to institute new government, laying its foundation on such principles and organizing its powers in such form as to them shall seem most likely to effect their safety and happiness.

The sentiment of the Declaration as exemplified in the government of the United States was forcefully expressed in the terse phrase of Abraham Lincoln as a "government of the people, by the people, and for the people." President Wilson has more recently presented the case for the common-consent theory in notable state papers. Among these is his address to Congress, April 2, 1917, respecting the relations of the United States with Germany. In recommending the necessity of the declaration of war, President Wilson said:

> Our object, now as then, is to vindicate the principles of peace and justice in the life of the world as against selfish and autocratic power and to set up amongst the really free and self-governed peoples of the world such a concert of purpose and of action as will henceforth insure the observance of those principles—a steadfast concert for peace can never be maintained except by a partnership of democratic nations. . . . Only the free peoples can hold their purpose and their honor steady to a common end and prefer the interests of mankind to any narrow interest of their own.

In this and in subsequent addresses President Wilson formulated the ideal of common consent as the foundation of political authority in opposition to the ideals of the past, force and divine right, which have been the basis for autocratic government.

The Evolutionary Theory.—The foregoing theories as to the incentive which led to man's association with his fellow-beings for civic purposes have been found to be at best only partially correct. Though there is an element of truth in each, they are now felt to be but a part of the modern theory of the evolution of political institutions. It is granted that the instinctive theory explains how at the very beginning of this evolutionary process the inherent qualities or characteristics of man caused him to associate with others, and that he is by his very nature a political animal. All along the line of this development it is obvious that he has, on the grounds of necessity, established his authority by force and then has sought justification for his action. Then, too, it was advantageous for those who succeeded in gaining an ascendency over others to employ and rely on the idea of a direct personal connection with a divinity to reinforce their power and authority. And while it is generally conceded that the social-contract theory cannot account for the origin of the state, it has without question served man's purpose in bringing about changes in the existing order of political institutions and in justifying the formation and exercise of political authority.

Upon examining, then, the evolutionary theory, which includes the other theories within its scope, it is found that modern complex political institutions represent a growth extending through many centuries. Just as the biologist maintains that plants and animals, as found to-day, had rudimentary beginnings in the past, that present-day species of both are the result of actions and reactions resulting from environmental influences, so the student of politics finds that political institutions represent the outcome of man's struggle to adjust himself to his environment

and to use the same in meeting the new conditions which are ever arising. This development from the primordial efforts in civic association to our present complex political institutions has been previously discussed. The earliest forms of concerted action were there traced in the family, the clan or gens, and the tribe. It was found that tribes united with tribes to form city-kingdoms, and city-states, and still later more complex and comprehensive systems of organization arose in the military nations of the Orient and of Europe. It has been shown, too, that with the growth of individual freedom in local provinces a strong centralized power dominating large areas becomes less and less possible. With the rise of the mediæval state and the modern nations, the complexity of modern political institutions has increased. This has resulted largely from the political consciousness which has been gradually awakened in man, not only in a few leaders, but in the great masses of mankind. The intricacies of modern government, then, have not arisen suddenly, nor have they been artificially imposed upon mankind by the ingenuity of a few of their number. Rather they are the results of the broadening intellectual outlook and the awakening of an increasing political consciousness within man in his attempt to adjust himself to a changing environment. The process, begun ages ago when man was a primitive animal, has continued to the present day, when he is found adjusting himself anew to the conditions of modern civilization.

The Economic Theory.—A phase of the evolutionary theory which requires brief consideration is the economic interpretation of the state. Attracting attention during the middle of the nineteenth century and gaining favor the latter part of that century, the economic interpretation of man's political development continues to claim an increasing number of adherents. Stated very briefly, it may be said that the main feature of the economic theory of the state is that political organization had as its chief incentive the necessity of man's economic struggle for existence.

In the evolution from his primitive conditions to his present status in society, the satisfaction of his increasing wants has occasioned the development of the control of one person over the life and working power of another; or, in the usual phraseology, it has resulted in the economic exploitation of man by man. The consequent exploitation of one class by another and the struggles which necessarily ensued were, according to this view, the important factors in the formation of the political machinery which is now called the state with its laws, courts, and numerous agencies by which the ruling classes and later the owners of large industries have sought greater power and protection. Beginning with the first subjugation and ownership of slaves by primitive peoples and ending with the great industrial systems of modern times, the advocates of the economic theory of the state interpret the various political developments as but steps in the history of the economic struggle between classes. The national state, with all its organization and administrative machinery, according to this view, has been evolved as a means by which the more powerful class exploits the results of the labor of the less powerful. Though it has gained many adherents, the economic interpretation of the state which regards the chief motive of political organization as self-preservation and the dominance of selfish interests, backed at first by brute strength and military power and later by political institutions based on laws and courts, has at the same time been adversely criticized.

Critics of this theory have attacked it on the ground that progress in political development would have been impossible had class struggle and class hatred been the dominant elements in man's evolution from primitive conditions. Then, too, it is maintained that in emphasizing the economic motive in progress there has been a tendency to read into the past forces and conditions which did not exist and which have developed in more recent years through changes resulting from the industrial revolution

which rendered it possible for a few individuals to control the work and results of the labor of many. Furthermore, instead of a deliberate attempt to form and control political institutions for the subjugation of one class by another, the interpretation and application of laws have at times seemed to work to the advantage of one class and the disadvantage of another. But when such interpretation of the laws is carried to an extreme, the result has usually been a change in political institutions which has alleviated the wrongs of the oppressed class. Though the economic theory of the state has thus served a useful purpose in calling attention to the influence of some of the fundamental factors in political progress, it is apparent that this theory, like some of the others briefly discussed, serves as only a partial explanation of the grounds for political obligation and control.[1]

Definitions

For the purpose of clearness and accuracy, brief definitions of a few of the terms in general use in political science are necessary. Subsequent chapters will amplify and render these more definite. The terms to be defined are society, nation, state, government, sovereignty, and law.

Society.—Society is the word commonly used to designate a group of persons who are bound together in relations more or less permanent and who share a common life. It is used frequently to comprise the social groups through which the common life of a people is carried on. In calling attention to life in society, sociology has given us a view of the individual as a socius—that is, a unit whose ideas and opinions are formed in large part by the groups in which he lives, moves, and has his being. It may be going too far to hold, as did Gabriel Tarde, that virtually all of the life of the individual is the result of imitating the acts and thoughts of his fellows, but sociology and psychology

[1] *Find some illustrations in modern society of the economic motive back of political control.*

are both combining to demonstrate how completely the life of the individual is a reflex of the groups to which he belongs.

Though the consideration of the influences that mold individual life in the major part of these groups belongs to sociology and psychology, in so far as these groups participate in and influence political action, they become of interest to the student of government. In the growth of democratic government and in the increasing influence of public opinion in politics such groups take a larger part in the determination of political action. It becomes imperative, therefore, to give consideration to the activities of social, political, and other groups as participants in the formation of public opinion and in the direction of the affairs of government. Society, then, as organized groups which assist in the direction of public affairs, becomes an integral part of the study of government.

Nation.—Nation has two rather distinct meanings. According to one, it refers to a collection of individuals who speak the same language, have similar customs, and are bound together by ties sentimental and psychological which go to distinguish one race from another. Thus, all who speak the German language, live in accordance with German customs, accept and follow German culture and traditions, no matter whether they live in Germany, Switzerland, the United States, or Brazil, are thus regarded as a part of the German nation. The criterion of nation in this sense is racial, and the ties which bind such groups are conceived as ethnic in character. To those who believe that government should be made to accord with racial customs and traditions, this view becomes of prime importance. And for countries inhabited by many races it creates a very difficult situation. As the perpetuation of nationality in this sense has become one of the chief aims of modern political and social groups, the difficulties involved in the territorial idea of government have increased. In England and in America, nation is used rather in a

political sense to comprise all of the people who live within a given territory and are subject to a common political control. The American nation thus comprises all of the people who live under the political jurisdiction of the government of the United States. From this standpoint the criterion of nation is political and not racial. Nation in the latter sense designates a people under a single political jurisdiction and is practically synonymous with the more common and specific term *state*.

State.—The terms most common in the description and discussion of political affairs are state and government. Since they are often vaguely and loosely understood, it is necessary to define them in a specific manner. State is sometimes used in an abstract sense to denote the universal phenomenon which appears in all types of political life.

> We recognize, however [says Mr. Willoughby], that no matter how organized, or in what manner their power be exercised, there is in all states a substantial identity of purpose; and that underneath all these concrete appearances there is to be found a substantial likeness in nature. If now we disregard all non-essential elements, and overlook inconsequential modifications, we shall be able to obtain those elements that appear in all types of state life, whether organized in monarchical or republican, the despotic or limited, the federal or unitary form.[1]

It is in this abstract sense that the state is conceived as the political activities of mankind wherever manifested. To some, the state is regarded as beginning only when a supreme power is created, such as that exercised by the patriarch in Judea, Greece, and Rome. To others, the state begins with the social and political life of man, and its origins are lost in the long recesses of the past when men first began to live in groups.

The more general use of the term state is to denote the permanent political organization of a particular portion of mankind. It designates, then, in a concrete sense, the organization through which the political life of a community

[1] W. W. Willoughby, *The Nature of the State* (The Macmillan Company, 1896), pp. 14–15.

functions. Though the manifestations of public power vary greatly, four essentials have come to be associated with the concept state, namely:

(a) A group of persons with common interests and common aims.
(b) A determinate portion of the earth's surface—a territorial basis.
(c) Independence of foreign control.
(d) A common supreme authority.

Political control in primitive communities does not, of course, exhibit all of these essentials. In fact, all four are distinctly manifested only in the modern nationalized state. In the pastoral tribes of the Orient and among the American Indians, the territorial basis of political authority was not well defined. In neutralized states, semi-sovereign states and protectorates complete independence of foreign control is lacking, and with the growth of international comity and international law complete independence of foreign influence and control is possible only for an international outlaw. With the establishment of a court of arbitration and an international court of justice, independence of foreign control will be even further curtailed. Moreover, while the organs of the state may possess authority to render final legal decisions, it is well known that the supremacy of the state is not absolute and not without limitations. Recognizing such limitations and restrictions, we may define the state roughly as a permanent political organization, supreme within a given territory, and at the present time, for most purposes, independent of legal control from without.

Government.—The organization and agencies through which the functions of the state are performed are known as the government. When we use the term government, we think of the organs through which the public functions, the machinery for carrying out the public will. All of the departments—legislative, executive, and judicial, the boards, bureaus, and divisions, officers and employees —go to make up the government. It is more specific than

state, and comprehends more definitely those who may be conceived and visualized as comprising public authority.

Sovereignty.—Sovereignty, or as it is often called supreme power, is considered the essence of the state. It is indeed the factor without which there can be no state. About this term, the political theorists have waged a long controversy. According to one school of theorists, sovereignty is unlimited, inalienable, indivisible, and absolute. To another school, such an unlimited, absolute power is inconceivable, it is contended that all public powers are limited, and, in so far as public authorities rule by law, they are of necessity restricted in authority and action.

Part of the difficulty in defining the word comes from a failure to distinguish various meanings. At one time, political sovereignty is thought of as the vague force at work through public opinion and the electorate, which are regarded as the ultimate power in democratic societies. At another time, the concrete expression of public power in constitutional conventions or constituent assemblies is considered as the exercise of sovereignty. The supreme power acting in this constituent manner, in the process of constitution making, is that alone to which some would apply the term sovereignty. What is ordinarily meant when the word is used in a governmental sense is more accurately called legal sovereignty. Legal sovereignty is the aggregate of powers possessed by the ruling bodies of a political society. It is made up of two features:

(a) Internal sovereignty—legally paramount authority over all individuals and authorities within the state.

(b) External sovereignty—independence from legal control from without. In a general sense the sovereign is regarded as incapable of legal limitations, but public power is, as a rule, exercised through public organs which are required to keep within certain spheres of action and are almost invariably limited in authority.

The Pluralistic and Monistic Theories of Sovereignty.—A controversy in which many political thinkers are now interested is involved in the nature of sovereign power and

its significance in society. The two views which are defended by opposing groups are the monistic theory and the pluralist theory of the state. According to the monistic theory, which has been for a long time the accepted theory of political science, the state is defined as a political organization which can enforce its will, if need be, by the use of physical force. To the major physical force which is the basis of this organization is given the name of sovereignty. Among the essential characteristics of such political organizations according to the monistic school are:

1. A territorial basis over which the sovereign power may be exercised.
2. Unity—there can be only one such sovereign in a territory.
3. The sovereign is absolute, unlimited, unalienable, and indivisible.
4. Individual liberty depends upon the protection and guaranty of the state.

By the advocates of the monistic theory attention has been directed chiefly to "direct and absolute power over each individual subject as well as over all groups of subjects."[1]

To the pluralists the underlying facts of political organization deny the unity and absolutism of the state which is characterized in the monistic concept of sovereignty. They do not regard the state as a social group as distinct from all other groups and paramount to them, but the state is merely one among many groups or associations into which mankind is divided and to which allegiance is accorded. Thus it is contended men

> form themselves into groups and societies and communities of various kinds, religious, cultural, social, economic. They have churches, the bank clearing house, the medical association, the trade-union, and wheresoever there is an interest strong enough to form a nucleus you will find men gathering around it in an association.[2]

To certain of these associations, it is maintained, the individual gives allegiance and loyalty not differing either in

[1] See "The Pluralistic State" by Ellen Deborah Ellis, *American Political Science Review*, vol. xiv (August, 1920), p. 393, for a brief summary of the views of the opposing schools.

[2] *The Nation*, July 5, 1919, p. 21.

degree or kind from that accorded to the state. The pluralistic conception of society in the words of one of its chief advocates

denies the oneness of society and the state. It insists that nothing is known of the state-purpose until it is declared; and it refuses, for obvious reasons, to make *a priori* observations about its content. It sees man as a being who wishes to realize himself as a member of society. It refers back each action upon which judgment is to be passed to the conscience of the individual. It insists that the supreme arbiter of the event is the totality of such consciences. It does not deny that the individual is influenced by the thousand associations with which he is in contact; but it is unable to perceive that he is absorbed by them. It sees society as one only in purpose; but it urges that this purpose has in fact been differently interpreted and is capable of realization by more than a single method. In such an analysis the state is only one among many forms of human association. It is not necessarily any more in harmony with the end of society than a church or a trade-union, or a Freemasons' lodge. They have, it is true, relations which the state controls; but that does not make them inferior to the state. The assumption of inferiority, indeed, is a fallacy that comes from comparing different immediate purposes. Moral inferiority in purpose as between a church and state there can hardly be; legal inferiority is either an illegitimate postulation of Austinian sovereignty, or else the result of a false identification of state and society. The confusion becomes apparent when we emphasize the content of the state. When we insist that the state is a society of governors and governed, it is obvious that its superiority can have logical reference only to the sphere that it has marked out for its own and then only to the extent to which that sphere is not successfully challenged.[1]

To one of the best known exponents of the pluralist theory the chief problem of political science is whether principles or rules (*une règle de droit*) are superior to the state and limit state action. The problem is

to learn whether these are obligations of a legal kind, positive or negative, which bind the state, considered by itself, delimiting the power of its several departments with the result of imposing duties of action or inaction upon its several departments, legislative as well as executive.[2]

[1] H. J. Laski, *Authority in the Modern State* (Yale University Press, 1919), pp. 65–66.

[2] Léon Duguit, "The Law and the State," *Harvard Law Review*, vol. xxxi (November, 1917), p. 2.

According to M. Duguit the answers to the problem take chiefly one of two forms which for convenience have been described as the metaphysical and realistic doctrines. With the metaphysical school are classified all those who regard the state as a personality distinct from that of individuals and who consider the basic element of the state "a personal being possessing a will which is by nature superior to individual wills, having no other will superior to it. The name ordinarily given to this concept is sovereignty."

From the standpoint of the realistic doctrine the state as a person is not distinct from the individuals that compose it. There is a state in human society when an individual or group of individuals has succeeded in monopolizing the power of constraint in that society and within definite boundaries; or in other words, when there is in a given society permanent differentiation between those governing and those governed. Instead of the will of the state there are merely the individual wills of those governing. The metaphysical group of M. Duguit's analysis corresponds to the monists who believe in an absolute sovereign, and the realist group corresponds to those who see in political society groups of individuals who divide their loyalty and allegiance among various social groups, of which the state is one of the most important.[1]

Undoubtedly there are merits in the contentions of each school. The monists set up as an ideal to work for in human society political organizations which exercise a supreme control over the political and social activities of the individual. Of course not all social activities are controlled by this all-powerful sovereign, but there is none which may not be subjected to political control when the

[1] The leading exponents of the pluralist theory are: Dr. Otto Gierke in *Das Deutsche Genossenschaftrecht*, 4 vols. (Weidmann, Berlin, 1913); J. N. Figgis, *Churches in the Modern State* (Longmans, Green & Co., 1913); Graham Wallas in *Human Nature in Politics* (A. Constable, 1908) and *The Great Society* (The Macmillan Company, 1914); Léon Duguit, "The Law and the State," *Harvard Law Review*, November, 1917; H. J. Laski, *Problems of Sovereignty* and *Authority in the Modern State* (Yale University Press, 1917 and 1919).

interest of the group so requires. On the other hand, the pluralist rightly protests against an unlimited sovereign with a corresponding legal omnipotence and asserts that states as well as other groups must keep within limits of the moral law and other requirements necessary to maintain social solidarity. In this respect the pluralist becomes an advocate of the theory of natural rights which is designed to check overinterference of the state with the affairs of individuals and groups. The contrast between the two views is well put by Ellen Deborah Ellis:

> The pluralist doctrine is timely in that it calls attention to the present bewildering development of groups within the body politic, and to the fact that these groups are persistently demanding greater recognition in the governmental system. How this recognition is to come, whether through group rather than geographical representation in legislative assemblies, or by some other means, is a problem in itself, for the proper and best way to deal with these groups is perhaps the greatest question before political science to-day. It may be, as most of the pluralists believe, that a federal organization of government is the solution. To such a solution, the monist could theoretically give his very hearty support, whatever his views as to its practicability might be; but in thus approving it, he would call attention to the all important fact, so consistently overlooked by the pluralist, that the truly federal state is a unitary state, of which the essence consists in the fact that in and through and above its multiple governmental organization there is one supreme loyalty and political sovereignty.[1]

Since government depends very much upon the character of the men who hold public office and who exercise public powers, as well as upon the legal rules which are laid down for their guidance, modern writers are inclined to think of sovereignty as the powers and the authority which those intrusted with public office see fit to exercise. In so far as they work by law and are guided by rules, their actions are limited; in so far as they are free to exercise an uncontrolled discretion and render decisions with the full force of public power back of them, they are unlimited.

Law.—Government is, to a large extent, a lawmaking

[1] "The Pluralistic State," *op. cit.*, p. 407.

and law-enforcing agency. The object of law is to provide for the systematic and regular public administration of justice. And justice, according to the famous Roman precept, requires the individual "to live honorably, to injure no one, and to give every man his due." Justice as thus defined may be administered according to the discretion for the time being of the person who administers it or according to law. Law means uniformity of judicial action—generality, equality, and certainty in the administration of justice. The advantages of law are: (1) it enables the prediction of the course which the administration of justice will take; (2) it prevents errors of individual judgment; (3) it protects against improper motives on the part of judicial officers; (4) it gives the magistrate the benefit of all the experience of his predecessors.

According to the English jurist Austin, law was defined as a command set by a sovereign to his subjects. These commands were in the nature of rules made by a determinate human authority, were general in application, dealt with external human action, and received their force and effectiveness through the sanction of the sovereign. Later jurists modified this view to include the rules enforced by the state, as well as those which were made by the state.

At present, the word is used to describe the body of rules and principles in accordance with which justice is administered by authority of the state or the rules recognized and acted on in courts of justice. The state is conceived to exist for the protection of human interests mainly through the determination of rights and duties. To determine in actual life what are the rights and duties of its citizens, the state needs and establishes judicial organs which settle what facts exist and also lay down rules according to which legal consequences are deduced from facts. These rules are the law.

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CHAPTER III

THE RELATION OF THE STUDY OF GOVERNMENT TO OTHER SUBJECTS AND THE METHODS OF THE STUDY OF POLITICS AND GOVERNMENT

The Relation of the Study of Government to Other Subjects[1]

Politics and government form a branch of an ancient study, as well as an art, which has engaged the attention of many intellects. Since the time of the Greeks, the study of subjects connected with government has formed a part of all programs of liberal studies. Not until comparatively recent times, however, have the extension of government functions and the increasing complexities of public administration demanded such consideration of political affairs as to require the establishment of schools, departments, and bureaus to deal with government both as a science and as an art. At the same time that interest in public functions has received special attention from educators and statesmen, a number of other subjects dealing with man in his social relationships has also received increased consideration. The relation of the study of government to the subjects which have grown with it and to which it is closely affiliated will be briefly sketched.

Government and History.—A field of human thought and investigation to which the study of government is intimately related is that of history. Human events and institutions have from time immemorial engaged the attention of the historian. First, we find the mere efforts of

[1] See H. G. James, "The Meaning and Scope of Political Science," *The Southwestern Political Science Quarterly*, vol. i, no. 1, June, 1920, p. 3.

story-telling; then, the culling from the past of those things which were designed to support a theory or develop a principle, such as the defense of monarchy, the support of democracy, or the more recent effort to glorify the spirit of nationalism; and then, finally, the genetic method of patiently and laboriously investigating how man's thoughts, feelings, and institutions have evolved. In the latter method, the scope of history becomes as broad as human interests and human actions—so broad, in fact, and so extensive that it has been found necessary to subdivide the field, with the result that we now have histories of political institutions, histories of literature, histories of art, histories of chemistry and of other sciences, as well as the historical setting for numerous other human interests and activities.

For a long time, history gave primary attention to the origin and development of political institutions, to the rise and fall of cities and states, to the doings of kings, diplomats, and ministers, to the development of law and legal institutions, as well as to war and methods of warfare. To this type of political history have now been added the specialized branches, such as the development of constitutions and constitutional government, diplomatic history, economic history, legal history, the history of colonies, and an account of many other interests which affect the life of mankind.

Though it is the function of political science to analyze political institutions, to describe their organization and working, and to forecast their probable development, it is primarily the function of history to trace the origin and development of the state and all of the political institutions connected therewith. Government and history must then be closely related throughout.

It is impossible to consider a topic in political science without giving some attention to the historic background and the political antecedents. And not a little knowledge of government is of necessity involved in the courses now

devoted to the history of nations and to the growth of political institutions. It suffices to say that the historian is chiefly interested in how an institution or a political practice sprang into existence and how it came to be what it is, whereas the student of government is primarily concerned with the present status of the institution, how it actually operates at the present time, what are its effects upon human relations, and what are its probable purpose and future development. History furnishes material for comparison and induction and for a comprehensive view of government; hence it is necessary for the student of politics not only to analyze existing political institutions but also to trace their origin and evolution.

For a long time history and politics together comprised those studies which dealt with man's development and the institutions which were created in his social progress. In the apt words of Professor Seeley, "Political science is the fruit of history and history is the root of political science." Frequently the two were treated together or in closely correlated courses. And it is only in recent times that politics and government have been separated from history and have been given an independent status in educational curricula. In Europe, where there was a greater demand for those trained in public affairs than in the United States, this separation was accomplished several decades earlier by the establishment in the large universities of schools of political science and in the formation of departments devoted to the branches of government and administration. In the United States, the first school of political science was established in Columbia University in 1880. It was more than a decade before the department had grown so as to be accorded definite recognition. At the same time, instruction in public affairs was begun in Johns Hopkins, Harvard, and Princeton universities. The growing complexity brought about by the rapid social and industrial changes of the nineteenth century, and the need of special training in many new fields,

led to the introduction of new subjects along with history and politics—namely, economics and sociology. As these courses have been introduced and expanded, the instruction has been organized under four divisions—namely, History, Political Science, Economics, and Sociology. These divisions constitute the general field known as the Social Sciences. The relation of the study of government to these newer divisions of the family of the Social Sciences requires some attention.

Government and Economics and Sociology.—While the relation between government and history is singularly close, the study of these subjects is also intimately connected with the problems and content of the allied fields of economics and sociology. Economics, as the science of wealth, has begun to deal not only with private and commercial activities in the satisfaction of human wants, but also with individual interests in relation to the state. Thus, such fundamental matters as money and banking, protective tariffs, the regulation of international trade, the regulation of wages and labor, of trusts and monopolies, of prices and business conditions, and the consideration of public finance and taxation, of socialism and social reform, as well as of the regulation of public utilities, are discussed not only in their relations to individual conduct, but also with respect to the public policies of the state. These discussions are similar in character to the consideration of these same subjects in government instruction. As a matter of fact, the relation between government and economics is very close indeed, since the two subjects comprise in large part a consideration of the same content and material with merely a difference in point of view and method of approach. The student of economics approaches government control and regulation from the standpoint of its effect on the individual and his activities in the satisfaction of wants, whereas the student of government approaches such control primarily from the point of view of public interests and from that of the state as a social

unit organized to attain co-operation in public affairs. Most of the problems of government control and regulation involve political and economic factors, and it is eminently necessary that each science render its contribution to their solution. An economist without a background of politics and of a study of government, and a political scientist ignorant of economics, are equally unprepared to render the best service to the public and to comprehend the main elements of community welfare.

Sociology, as the science of men in their associated processes, is one of the most recent branches of social study. Along with the anthropologist and the ethnologist, the sociologist has rendered a distinct service in tracing the origin of human institutions, such as marriage and the family life, property and primitive forms of government, and social control, as well as the evolution of religious and moral ideas. Thus, a background much more thorough and comprehensive than that furnished by history has been made available to the student of politics. Besides sociology has not only enriched our knowledge of the evolution of social and political institutions, but it has aided in furnishing a more complete analysis of the factors which now affect the life of man in society. The geographic and economic factors which influence man, as well as the psychological causes which affect society, have been subjected to critical analysis. With the aid of biology, psychology, and other sciences, the various factors in heredity and environment which surround man and influence his life and thought have been given more adequate consideration. Similarly, the relation of the individual to the social order and the principles of social control have been discussed from a standpoint more comprehensive than that of either economics or political science. "To have insisted upon seeing the social process whole," says a leading sociologist, "to have influenced the spirit and method of all the social sciences, to have oriented them in a new direction—these are enduring services in which the sociologist may well

feel satisfaction." Furthermore, sociology has been characterized as an art which seeks to translate principles into social welfare. The contribution of sociology to the consideration of such problems as crime and pauperism, immigration and housing, and environmental influences in the formation of character has been notable. The study of government, therefore, in the broad sense of man's relation to the state is enriched by the pioneer work of the sociologists.

It is necessary not only to indicate briefly the relation between government and the allied social sciences, but also to describe its connections with law and with psychology, philosophy, and ethics.

Government and Law.—The evolution of government and law is enshrouded in mystery and is slowly and laboriously being brought into clearer light by the combined contributions of the numerous groups of scientists engaged in the historic interpretation of human development. That the form of government or political control and that of law have been intimately associated from the beginning of human society now seems relatively clear. Whether the chief of the group be merely mother or father of the family, or whether he be a judge, a priest, or a warrior, the community was governed by rules or customs which had the sanction of law. To be sure, the customs at first were unwritten and somewhat vague. They existed in the minds of the leaders who were charged with their enforcement. But they were none the less well defined and inexorable. Since De Coulanges in his admirable study of the *Ancient City* demonstrated the all-pervading and powerful dominance of custom in the patriarchal families of ancient Greece and Rome and Sir Henry Maine brought to light the same results for ancient India, no one seriously questions that in the control of primitive societies customs were often more rigorous than the laws of the present day. In the course of time there came a demand that the rules and customs of the community be written, as was the case

when Draco and Solon were called upon to put the customs of ancient Greece into writing and when the Decemvirs in Rome met the same demand in the memorable Twelve Tables.

When the rules and customs were written into codes, the settlement of controversies was made more systematic and exact, and custom developed into a body of laws whereby disputes were peaceably adjusted. Harsh and crude as were many of the laws of these early codes, the method of administering justice was far superior to that of earlier times, when the individual was uncertain as to his punishment or when he was free to resort to arms to secure justice by seeking revenge from his malefactor. The fear of arbitrary power and the danger of the recurrence of the method of revenge tended to make the law of this period strict and formal. Its principles were regarded as rigid and immutable, and its chief characteristics were certainty and uniformity. It was a long time before the application of the law was made more liberal and the former rigor and certainty were relaxed. But in time, executive orders and powers exercised by legislative assemblies began to expand the rules and principles of the earlier codes and to liberalize the laws under such terms as equity and good conscience, reason, and natural law. The methods and procedure in the administration of justice became more systematic and regular. Consideration was given to individuals as human beings, and ideas of good faith and reason began to bring about a relaxation in the harshness and severity of the letter of the law. The law was changed so as to conform to the newer ideas. Thus, the conception prevailed of promoting and enforcing good faith and moral conduct through the law and of relying upon reason rather than upon rule and form. And as reason and equity found entrance into law and into its enforcement, the watchword of equality gained acceptance—equality in the operation of legal rules and equality of opportunity to exercise one's faculties and employ one's

substance.[1] In short, protection, justice, and the regulation of human interests came primarily through the law. The essential part of government is the legal control of human relations. Government and law are inseparable.

Though government is inseparably linked with law and law with government, government is a more comprehensive term than law, and many interests and activities come within the scope of the former which are only remotely connected with the latter. Government, it is conceived to-day, is primarily engaged in making and enforcing law; in this great process many interests, religious, social, and industrial, affect and participate in the functions of government without necessarily acting through law and definite legal channels. Social customs, racial traditions, public opinion, and multiform avenues of community thought and action are brought to bear on government in the complex process of converting rules of action into statutes and legal forms.

Government and Psychology, Philosophy, and Ethics.— Until recently, there was little thought of the relation of psychology to government. But since Gabriel Tarde discussed the rôle of imitation in human conduct, and since Professor James and other psychologists have made it clear how large a part of all our thinking is a social product, some investigators have begun to inquire as to the foundations of social psychology and the psychic forces in political action. Thus far, some suggestive analyses have been made of the mob mind and the activities of the individual under the influence of the crowd. So, too, the results of custom, tradition, and imitation have been traced in the formation of many of our most cherished political notions. The psychic forces which affect men as they act through party groups and which underlie the formation of public opinion have received only scant attention.[2] But as psychology

[1] Roscoe Pound, "Legislation as a Social Function," *American Journal of Sociology*, vol. xviii, p. 755.

[2] See especially Graham Wallas, *Human Nature and Politics* (A. Constable, London, 1908), *The Great Society* (The Macmillan Company, 1914), and *Our Social Heritage* (Yale University Press, 1921).

has developed objective standards for the measurement of human intelligence, these standards have proved of great value in the classification and the treatment of the feeble-minded, in the examination and diagnosis of criminals, and more important still, in the examination, classification, and general testing of men for military service. The rôle of psychology in government has been given an impetus during the World War which bids fair to bring astonishing results when political energy is turned to peaceful pursuits.

While the relation of government to philosophy and ethics seems somewhat remote, it is not at all difficult to indicate the close connection between philosophy and ethics and governmental affairs. As every individual lives and acts a philosophy of life, so everyone who has anything to do with public affairs consciously or unconsciously puts into his public acts something of his own personal and political philosophy. Thus, there are among administrators, individualists and socialists, rationalists and utilitarians—in fact, as many different points of view as there are social divisions or groups.

Furthermore, political theory and speculation have always been a fruitful field for philosophers. Each age and race brings forth its own special type of political philosophy, and as a result of war, the fundamental concepts of socialism and social control, of nationalism and internationalism, of racial and political unity, of the underlying causes of war and peace, are being revised. There appears to be in process a new formulation of political philosophy which will better reveal and develop an international political consciousness.

According to the suggestion of Machiavelli, politics and ethics ought to be entirely separate, and the state ought not to be bound by the usual rules of morality and ethics to which the individual is subjected. The theory that the state can do no wrong, along with the divine right of kings, has frequently led to the application of Machiavellian prin-

ciples in practical politics, and it has not been uncommon for political leaders to refuse to abide by contracts and solemn obligations entered into in good faith. In the failure to recognize financial obligations, in the repudiation of debts, and in the refusal to abide by the well-known terms of international treaties the suggestion of Machiavelli is frequently put into practice by diplomats and rulers. As the history of national development during the past centuries is reviewed, it appears that states have been prone to regard politics and ethics as unrelated in the repudiation of such obligations as were conceived to be detrimental to the national interests.

But in the past, as well as at the present time, a number of political leaders have supported the principle that a state, like an individual, should be subject to the obligations and duties of morality and right. It becomes increasingly the duty of government to fix norms of morality and right to which states as well as individuals are required to conform in their social life. And those who refuse to abide by these standards, who break the rules of society, and who engage in unfair practices must be dealt with as anti-social and out of harmony with the social order. Government, law, and ethics become the agencies through which the social order is maintained in such a way as to offer the greatest opportunities for self-development to the individual and to the social groups which form the nation.

In the course of the foregoing survey of the relation of the study of government to a few other subjects, there has been given some indication of the extensive character of the study of government. In fact, the marvelous growth of government and its far-reaching effects upon human life can be hardly more than touched upon in an elementary treatise. It is by no means possible to sketch the many and diverse relations which exist between government and the other great divisions of human knowledge. As political functions are extended and as the scope of the social

and the physical sciences is enlarged the relations of government with allied fields of knowledge will become more intimate.

The Methods of the Study of Politics and Government

The subject matter of politics and government may be approached from four main points of view—namely, the historical, the comparative, the analytical, and the philosophic or idealistic.

The Historical Method.—A search for the origin of society and of the political phenomena which accompany its development has engaged the attention of mankind since the union of men into social groups and the emergence of social consciousness. The beginnings of the family and the state, the evolution of custom and law, and the growth of the complex organizations under which we now live in our political life have claimed the attention of many historians and social scientists. A guide to the interpretation of the present is furnished by the past, and government can be understood only through a systematic study of the successes and failures of preceding races and past ages.

The historical method not only renders invaluable contributions to the origin of human social and political institutions through the avenues of archæology and allied sciences, but also constantly sheds new light upon the psychic forces which move men in social groups. It is history which supplies an analysis of the forces—geographic, economic, and psychic, which give form and shape to all political institutions. Furthermore, a more careful and exhaustive analysis of ancient customs, laws, and government agencies is giving a better basis for comparison, analogy, and criticism of present political forms and practices. As the psychologist formulates a better method of analysis of social purposes, motives, and thinking processes, and as the historian enriches our knowledge of

past ages, a basis for scientific inference and prognostication will be attained which will render political affairs amenable to more exact methods and to more certain rules of guidance.

The Comparative Method.—It is the nature of man to be provincial in his outlook and to conclude that his own community and its habits are well-nigh perfect. What ex-President Eliot described as American "bumptiousness" is a characteristic not confined to Americans. To live in a small community, to become accustomed to its ways, and to conclude that these ways are superior to those of any other community is a characteristic which is common to mankind. To counteract this trait, man's imitative nature has been a redeeming feature. When through war, the chase, or the exchange of products, new ways of doing things were discovered and a daring innovator brought into the home camp the idea of a better method of doing things, its adoption frequently followed, despite the opposition of tradition and inertia. It is a late development indeed when the narrow provincialism of community life gives way consciously to an open search for the new and the better. Yet this is what has come to pass in the introduction of the comparative method in the study and practice of government. With the historical and analytical study of many governments rendered available, and with opportunities for the observation of these governments at work, there has come a deliberate effort to reconstruct and to improve existing political institutions in the light of the study of foreign practices.

Thus Canada, Australia, and Switzerland mold their constitutions in the light of the experience of our own federation, and other nations use our experience in developing the judicial review of legislative acts. France sends a commission to the United States to study the separation of church and state. For guidance in improving our law, we send commissioners to England, France, and other European countries. And to remodel our local government and municipal administration, we find our

chief inspiration and guide in the more successful experience of European neighbors. The comparative study of political institutions has now come to be a feature of our educational system. Moreover, in the Continental Legal History Series, in the American Legal Philosophy Series, and the Criminal Science Series efforts have been made to encourage the exchange of legal ideas with a view of enriching legal studies and of rendering easier and more certain the necessary steps in law reform.

The Analytical Method.—As a biologist examines a beetle, taking it apart, placing each part under special analysis and scrutiny, observing one part in relation to another, considering the composition and make-up of each portion and attempting to discover the work or function which each part of the organism performs, so may the student of government approach his subject from the analytic point of view. Though it is not advisable to urge the analogy too far, for the state does not exhibit all of the characteristics of an organism, it is nevertheless true that the method of the biologist may be followed, with necessary variations, in the study of government. Thus, it is possible to examine the organs through which government is conducted; the departments, the divisions and bureaus may be analyzed in detail, and the organization and powers of each division defined. The relation of the departments and their subdivisions one to another, the functions performed by each of the departments and divisions, and finally, the general purpose and methods of functioning of the entire government, may be critically analyzed.

In approaching government from the analytic standpoint, it is possible to take the entire government of a nation and to define the large divisions, such as legislative, executive, and judicial, to analyze and describe the foundation of the government in constitutions and in laws, and to discuss the powers which the state exercises. But another approach under this same method is to take some division or bureau, such as the Census Bureau or the Public Health

Service, and to study completely the organization of such a unit, its methods of doing work, the purpose which it aims to accomplish, and the effectiveness with which it performs these services. The latter is, of course, the more thorough and more satisfactory, but is unfortunately too little used in comparison with the customary superficial analysis of large government departments.

To the historical and comparative methods, the analytic method furnishes the minute and laborious analysis of existing government agencies, on the basis of which alone relatively adequate judgments may be formed.

The Philosophic or Ideal Method.—The search for ideals and the attempt to peer into the future where visions and dreams may be realized seem to parallel the conscious life of man. At least as far back as records go, there are found in art, architecture, and bits of poetry the age-long efforts to depict the ideal conditions for the future.

But the philosophic or ideal method has been made immortal by its presentation in the great work of Plato, *The Republic*, where a master intellect undertook to describe the conditions under which an ideal state might be formed and in accordance with which man might attain his highest development, material, intellectual, and moral. Since the appearance of *The Republic* there have been numerous attempts to construct imaginary ideal states. Notable among these attempts are More's *Utopia*, Campanella's *City of the Sun*, and Bellamy's *Looking Backward*. Interesting as these attempts at prophetic glimpses into the future are, none of them approaches the symmetry and suggestiveness of *The Republic*.

The philosophic or ideal method is evidenced not only in the efforts to picture an imaginary ideal state but also to render more clear the object which rulers and people set before them as a goal. As each individual of necessity formulates and lives a philosophy of life, so those intrusted with public power act upon a philosophy or philosophies and aim to attain certain ideals. This

philosophy may be, as in Greece, an attempt to give free play to the social, intellectual, and æsthetic capabilities of select groups, or, as in Rome, an effort to secure mastery and unity and through the power thus acquired to spread doctrines of reason, justice, and equity. The divine-right monarchs, conceiving that their mandate to rule came from God, developed a philosophy to support the concentration of all public interests and public powers in their hands, whereas, according to the ideal of popular sovereignty, the government is conceived as the agent of the people to carry out their wishes and to exercise those powers only which the popular mandate sanctions. It may be a philosophy of individualism in which the theory prevails that Jefferson epitomized in the precept "that government is best which governs the least" and which Tolstoy describes as the ideal state when the selfishness of man is banished from the earth. Or it may be a philosophy of socialism in which all public services of man are cared for, protected, and performed by a single, all-embracing organization of society. Be it socialistic, individualistic, or one of the numerous variations between, those who govern are influenced by their social philosophy. The attainment of ideals underlies the individual acts of public servants and determines the trend of the public affairs of a nation. As individual ideals are combined in the social group, there is formed that complex entity known as the social ideal. Such pregnant concepts as patriotism, nationalism, and militarism represent ideals which crystallize into a sentiment or a policy for which the group will strive and contend. The philosophy of government and governmental methods has indeed a great influence upon political practice and thus upon the lives of men in society.

None of the methods—historical, comparative, analytical, or philosophical—can be pursued singly with much profit. It is when all are combined that the best results are secured in government study. And in proportion as the art of government is enlivened and enriched by the

contributions of all these methods the management of public affairs will be elevated to a plane of reasonableness and right conduct under which the greatest good of the greatest number will be assured, and at the same time there will remain ample opportunity for individual freedom and self-expression.

While the method pursued in the following chapters is primarily analytic, the other methods—historical, comparative, and philosophical—are constantly employed to supplement and to render suggestive the functional analyses. Just as the analysis of government at the present time necessarily involves some delving into the past, so this analysis requires a look into the future. Political institutions or practices are considered not so much as fixed things, but as in process of becoming something different. In this process, ideals of political philosophers and the visions of reformers, all play a prominent part in the reconstruction which is going on. Whither, then, is an institution or a political practice tending? What are the directions in which the reformers and idealists would have political institutions go? What is the goal toward which humanity is striving? These are perennial questions whenever any part of the complex government machinery is under scrutiny.

Since then, the scope of reform and the scan of the idealist are limitless, and since to enter into the process of reconstruction of even any small part of government is exceedingly difficult, it is impossible to get a vision of government as a progressive mechanism without some effort at least to indicate the movements for change and reconstruction which are now under way. Without setting out to defend any particular theory of reform or of reconstruction, it has seemed advisable—in fact, necessary—to give some indication of the movements, directions, and prospects for reform and reconstruction. Thus, the past may well be called upon to give the setting for the present, and the present will be interpreted in the light of the con-

ditions and processes out of which a new order is arising. The study of government thus becomes a working partner with history, philosophy, psychology, economics, sociology, statistics, and numerous other sciences which together are "closing in on the total meaning of life."

Is the Study of Government a Science?

A query which frequently arises and on which there has been much discussion is whether the subject of government may be called a science. It is customary to point to the waste, the weaknesses, and the inefficiencies in government administration, and to speak disparagingly of the science of government. Or perchance the waywardness of politicians, the prevalence of graft, and the uncertainties of popular majorities are used to cast reproach upon government as a science. But despite the somewhat common conception that government is not a science, but an art in which the wiles and wary methods of the politician and his inner circle of satellites alone find employment, the words political science have come into general use. What, then, is Political Science?

The term *political science* has been used for various purposes, to which brief reference must be made. When about thirty and forty years ago the study of such political subjects as history, politics, economics, public law, and jurisprudence began to receive systematic consideration in the universities of Europe and America, it was not uncommon to use the term political science in a general sense as comprising all of these subjects. As these studies began to be more clearly differentiated into separate departments of history, economics, and sociology, the phrase *political science* came to be applied to the more specialized study of government and politics. It is the latter meaning which is now accorded almost universally to the words *political science.*

Even in this somewhat restricted sense, the subject has

come to be separated into well-marked divisions: first, courses in descriptive and comparative government, in which an effort is made to give the historical setting and the present analysis of the more important governmental systems of the world; second, courses in political theory, in which the history of political theories is traced in order better to understand and interpret the present tendencies in political thought; third, public law, including international law, constitutional law, commercial law, and jurisprudence; and fourth, functional studies, in which such subjects as political parties, legislative methods, judicial procedure, and the regulation of public utilities and of social and industrial affairs are given thorough consideration. For convenience in defining the present scope of political science, the following table is suggestive:

A. Descriptive and Historical.
   1. American government.
      a. National.
      b. State and local.
      c. Municipal.
   2. Comparative government.
   3. Party government.
   4. Colonial government.

B. Theoretic.
   1. General political science—theory and analysis combined.
   2. History of political theories.

C. Legal.
   1. Constitutional law.
   2. International law.
   3. Elements of law and jurisprudence.
   4. Commercial law.

D. Miscellaneous.
   1. Foreign relations and world politics.
   2. Legislative methods and procedure.
   3. Public administration and administrative methods.
   4. Regulation of public utilities.
   5. Regulation of social and industrial affairs.[1]

[1] See report on *The Teaching of Government* by the Committee on Instruction of the American Political Science Association (The Macmillan Company, 1916), p. 199.

Another meaning given to political science is that which is frequently applied in European countries, where administration is distinguished from politics and where the term is restricted to the science of administration. Here, entrance to the administrative service requires, as a rule, a thorough secondary education, the equivalent of a college course in the United States, and frequently advanced instruction leading to a higher degree with a rigorous type of work throughout. The subject of administration is regarded in the universities, as well as among men of administrative affairs, as calling for just as much thoroughness, study, and accuracy as any other branch of university education. In the administrative service, there is developed a real political science.

Since the study of government has been separated from the other social sciences, the subject has been approached from several different points of view. One type of course deals with the theory of the state, its origin, basis, and general nature. Sovereignty, the forms of government, and the theories and political principles involved in the departments—legislative, executive, and judicial—are discussed with an analysis of the ends and aims of the state. This method of study had its highest development in Germany under the title *Allgemeine Staatslehre*, and was introduced into the United States in certain treatises on political science. These works deal largely with political theory and with some facts and conclusions gathered from a study of several systems of government.

Other courses in political science aim to give the historical basis of modern governments and a descriptive analysis of existing governments. Such courses as American government, or, more accurately, the government of the United States, the government of England, the government of France, municipal government, and state government are courses which are largely historico-descriptive in character and the informational purpose is dominant. Frequently the historico-descriptive courses deal with a number of

governments, and are designated as comparative government. In such courses an effort is made to form conclusions and judgments by the method of comparison and analogy. Few of these conclusions are definite enough or of sufficient validity to give a scientific character to these courses.

Introduction of the Scientific Method.[1]—That the scientific method may be applied to research in governmental affairs has been demonstrated in the exhaustive studies made by political scientists, economists, sociologists, and statisticians as to the operation of governmental agencies. By inductive studies in which the influences affecting governmental action are analyzed, conclusions which approach the certainty and accuracy of science may be formed and be used in the making and the enforcement of laws. As a result of studies of this character, some branches of government can now be based upon recognized principles of administration; and in a few fields, such as health, finance, and public-welfare departments, a technic has been prepared which may guide the government administrator just as the engineer is guided by the manual of technic in his work.

Government is a great business involving the expenditure of billions of dollars, the purchase of millions of dollars' worth of goods and of property, and the handling of enormous sums of money collected as taxes and expended through appropriations. It involves, therefore, the science of finance and accounting. As the method of cost accounting comes to be applied to this great business undertaking, there will be greater fields of usefulness for the trained financier and the cost accountant. In the administration of public health, government makes use of the contributions of the science of medicine; and in bringing about the conditions which make for better health, the new science of public sanitation is being developed. In departments

[1] *Cf.* E. B. Rosa, "The Economic Importance of the Scientific Work of the Government," *Journal of the Washington Academy of Sciences*, vol. x, no. 12, June 19, 1920.

of charity and corrections, governments employ such principles and practices as are followed by the semiprivate organizations of charity and philanthropy. In administering the workmen's compensation acts, the work of actuaries and their scientific results are employed. In the erection of government buildings architects and sculptors are called into service and in the establishment of parks and playgrounds the landscape gardener has an opportunity to render his highest and best service. In the building of great public works, the science of engineering renders its public service. In the collection of masses of information and the preparation of the decennial census, a veritable science of statistics has been developed. The statistical method has, in fact, been applied to almost every branch of governmental activity, and with striking results, from the standpoint of scientific accuracy. Thus, a large part of the work of government is scientific in character, and involves the methods, the principles, and the practices of virtually all of the sciences.

The prosecution of war called into the government service the leaders of all of the great sciences. To the discoveries of the physicists and the chemists were added the astonishing progress of inventions and the constructive genius of the engineer. The highest accomplishments of medical science were employed to care for the soldiers in training and in warfare, and to save and restore to health again the wounded. To classify the men and to place them where they would be most efficient, the developing science of experimental psychology was brought into the government service. While the government needs all of these agencies in war times, it likewise finds most of them indispensable for efficient government service since the nations are again restored to a condition of peace.

It remains to call attention to the fact that government is essentially legal in character, and that most public functions are involved in the process of lawmaking and law-enforcing. Government, as a lawmaking and law-enforcing

agency, builds upon the ancient and well-established science of law. Though the science of legal methods and government, based upon the scientific principles which have developed therefrom, have had a slow growth, and, though much in lawmaking is still uncertain and haphazard, the legal phases of government in the processes of lawmaking and law-enforcing by the courts are becoming more scientific in character.

As the principles of the recognized sciences now employed extensively in government administration are put into systematic form, a technic is developed which constitutes a basis for a science of administration. Such a technic has been accurately and systematically formulated in only a few fields, as in the administration of health departments, of police departments, and of fire departments. The method is capable of development and extension, however, to other branches of public affairs.

Government, then, like other branches of human knowledge, is in the process of becoming a science. Enough has been accomplished to indicate that the scientific method will close in upon and eventually dominate parts of political science, in which chance, rough guesses, and crude rule-of-thumb practices still prevail to a considerable degree. But since human nature is varied and extensive in its manifestations, and since not all of human conduct can be brought under the exact measuring stick of science, there will always be room for the exercise of the imagination and the analysis of the intricate factors which determine human conduct and which are scarcely susceptible of systematic calculation.

SUPPLEMENTARY READINGS

The Teaching of Government. Report to the American Political Science Association by the Committee on Instruction (The Macmillan Company, 1916), see especially Part IV—Report on Instruction in Colleges and Universities, pp. 135 ff.

JAMES BRYCE, "Relations of Political Science to History and to Practice," *American Political Science Review*, Vol. III, p. 1, February, 1909.

H. G. James, "The Meaning and Scope of Political Science," *The Southwestern Political Science Quarterly*, Vol. I, No. 1 (June, 1920), p. 3.

J. W. Garner, *Introduction to Political Science*, Chap. I (American Book Company, 1910).

E. B. Rosa, "The Economic Importance of the Scientific Work of the Government," *Journal of the Washington Academy of Sciences* Vol. X, No. 12, June 19, 1920.

An excellent summary of the activities of the federal government for research, education, and developmental work.

Part II

PROBLEMS OF PUBLIC CONTROL OF GOVERNMENT

CHAPTER I

PUBLIC OPINION AND POPULAR CONTROL OF GOVERNMENT[1]

There is hardly anywhere a work on political science that does not, when it examines the phenomena of public opinion, either indulge in some wise and vague observations, or else make a frank admission of ignorance. And yet what can there possibly be to a political science with the very breath of its life left out? He who writes of the state, of law, or of politics without first coming to close quarters with public opinion is simply evading the very central structure of his study. —A. F. BENTLEY, *The Process of Government*, p. 163.

PUBLIC OPINION A POTENT FACTOR IN GOVERNMENT

GOVERNMENT in ancient times—in fact, during all times—has been based to a certain degree upon mystery. But especially was this true of the ancient world when rulers believed that they derived their powers from unseen spirits whose will could be evoked and executed only by the chosen few. Monarchy prospered for many years under the assumption of the mystical connection between the rulers and a divinity, and even to this day there still remain a few nations supposedly existing under the domi-

[1] Secure the publications of the following associations and societies and note in particular efforts to formulate and direct public opinion:
American Public Health Association
American Social Hygiene Association
National Municipal League
American Proportional Representation League
Short Ballot Organization
National Child Labor Committee
American Association for Labor Legislation
Play Ground and Recreation Association of America
American Federation of Labor
National Association of Manufacturers
National League of Women Voters
Addresses of these organizations may be found in *The World Almanac* or *The Survey*.

nation of the theory of the divine right of rulers. Survivals of this attitude toward government are the ideas that government is something above those governed, that those in office have been in some manner removed from common humanity, and that there is due to them an awelike reverence. Gradually, however, with the spread of democracy a change is being effected. Government is coming to be looked upon as a means to an end—a means whereby the best interests, at least of the majority governed, may be well served—and the officials in whose hands the execution of the government is placed are regarded as servants of the people, put in power by them and removed at their will.

The change in attitude has been due largely to the growth and power of public opinion, which finds expression through press and platform. Before the invention of the printing press—in fact, prior to the time when newspapers and magazines began to be read generally and when pamphlets and literature were distributed by interested persons—public opinion was necessarily slow in forming and even slower in making its influence felt in the management of public affairs. Only a few knew of the various acts of those who held the authority to rule. Laws, rules, and decrees were familiar to a very small part of the population. Few could read or write, and still fewer had either the time or the inclination to take an interest in the functions of government. It was assumed that the management of government belonged to a distinct class comprised, as Hamilton aptly suggested, of "the rich and wellborn."

Not before the nineteenth century, and especially the last decades of that century, did public opinion become a vital force in government. Two great factors of modern times have tended to increase the strength and the influence of public opinion. The first of these has already been referred to—namely, the modern devices to inform the public. The second is the extension of the electorate. The latter has been a slow and gradual process and is one of the chief accomplishments of democratic government. From the

feudal and aristocratic conditions in which government was felt to be the business of the monarch, his relatives, and retainers (*i.e.*, a select and aristocratic class expected to perform the functions of the public) the leading countries of the world have developed to a condition in which the majority, at least of the male citizens over twenty-one years of age, are permitted to participate in the election of public officers and in the determination of governmental issues. A considerable number of communities have extended this privilege to women and have taken the necessary steps to grant to women that share in the management of the government which is due all responsible persons.

The extension of the electorate, the growth of democracy, and the influence exerted by public opinion are creating a greater interest in the management of government among the citizens than ever before. It is just beginning to be realized that the government is a great co-operative concern and that the citizens share with the officials the responsibilities involved. The various functions which government has come to perform, the intimate way in which political affairs touch the life of the citizen, as well as the disastrous results which follow when government is weak and inefficient, all of these are emphasizing the need of an active interest in the government as the biggest co-operative undertaking of mankind.

It is no longer the practice that people defer to the judgment and leadership of kings or dictators, but instead it has been definitely determined that the citizen shall take an active part in the administration of public affairs. The citizen is called upon to select public officials and to exercise control over them. He is called upon to vote upon fundamental issues of politics in matters of local, state, and national concern. In numerous cases the responsibility of the citizen is much greater than in the past, and the necessity of a knowledge of governmental affairs is thereby greatly increased. To meet this need, a heavy duty is

placed upon the agencies which train for civic efficiency. There was never a time when there was a greater demand and more immediate necessity for a study of social and political affairs. Efforts are now being made to educate the citizen in the performance of his share in public business and to encourage active participation in the duties and responsibilities which rest upon citizens in a government where democratic principles prevail. It is indeed true that "a wave of organized democracy is sweeping around the world based upon a broader intelligence and a more enlightened view of civic responsibility than has ever before been obtained." The enlarged civic responsibilities which now devolve upon the citizens of our political communities demand a thorough and extensive study of the principles and practices of government.

Nature and Characteristics of Public Opinion[1]

Since popular government has come to be defined as the control of politics by public opinion, it becomes of prime importance to define somewhat carefully the nature and characteristics of public opinion. Public opinion is likely to be regarded as a mysterious power, its true meaning to be misinterpreted, or the limits of its authority to be defined inadequately. In the first place, public opinion is not strictly the opinion of the majority, for individual views must to some extent be weighed as well as counted. The intensity of a belief or opinion is often of greater significance than the number of those accepting it. It is often the effective minority that forms and carries into execution that which is ordinarily called public opinion. As Rousseau pointed out, a minority may at times express real public opinion; that is, they may stand for the best interests and the advancement of a given society, and by

[1] In the preparation of this and the following sections, A. L. Lowell's *Public Opinion and Popular Government* (Longmans, Green & Co., 1914) has been found suggestive.

steadily upholding their views may, in the end, convince a majority of the correctness and justice of their cause. Furthermore, a group of men are regarded as politically capable of participating in the formation of public opinion only in so far as they are agreed upon the principles by which the desired ends may be attained.

That public opinion is formed by a very small group in all countries was maintained recently by James Bryce:

> The time-hallowed classification of forms of government divides them into monarchies, oligarchies, and democracies. In reality there is only one form of government. That form is the Rule of the Few. The monarch is always obliged to rule by the counsel and through the agency of others, and only a small part of what is done in his name emanates from his mind and will. The multitude has neither the knowledge nor the time nor the unflagging interest that are needed to enable it to rule. Its opinions are formed, its passions are roused, its acts are guided by a few persons—few compared with the total of the voters—and nothing would surprise it more than to learn by how few.[1]

The same view was expressed by Bryce in another discussion of public opinion in which he asserts that:

> In examining the process by which opinion is formed, we cannot fail to note how small a part of the view which the average man entertains when he goes to vote is really of his own making. His original impression was faint and perhaps shapeless: its present definiteness and strength are mainly due to what he has heard and read. He has been told what to think, and why to think it. Arguments have been supplied to him from without, and controversy has embedded them in his mind. Although he supposes his view to be his own, he holds it rather because his acquaintances, his newspapers, his party leaders all hold it. His acquaintances do the like. Each man believes and repeats certain phrases, because he thinks that everybody else on his own side believes them, and of what each believes only a small part is his own original impression, the far larger part being the result of the commingling and mutual action and reaction of the impressions of a multitude of individuals, in which the element of pure personal conviction, based on individual thinking, is but small.[2]

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[1] *American Political Science Review*, vol. iii (February, 1909), p. 18.

[2] *The American Commonwealth*, vol. ii, new and revised edition (The Macmillan Company, 1910), p. 253.

Thus individuals, in the forming of opinions and judgments, are constantly acting upon suggestions without being aware of their origin or of the fact that the conclusions were formed by others. In spite of all the modern devices to educate the public, the majority of the people accept ready made, with little consideration, most of their fundamental political principles. Where opinions are accepted without careful thought or adequate reasoning, such opinions can hardly be called "public opinion." In order that public opinion may not be superficial it is necessary that a large portion of the people be prepared to form and be desirous of forming their judgments by the consideration of the facts and evidence.

The conditions essential to the formation of public opinion are: 1. Homogeneity of population; 2. Freedom of dissent; 3. The necessity of the acceptance of the will of the majority fairly and clearly expressed. As to the first, there are great difficulties and almost insuperable obstacles to the formation of public opinion where such opposing influences as race feeling, religious differences, or class bias are in evidence. Similarly, the conflict of selfish interests may interfere with the forming of public opinion. Homogeneity of population and community of interests are the conditions which tend toward making public opinion effective. Second, freedom of dissent is necessary. The minority must have the right to propagate their views by all fair and peaceable means. There must be, also, the utmost freedom of organization in the preparation and advocacy of opinions. Finally, an essential condition for any form of popular government is that the will of the majority, fairly and clearly expressed, be acquiesced in and that the minority accept the decision until such time as its opinion may come to prevail. Popular government has not been a success in some countries because minorities have refused to abide by the decisions of the majority.[1]

The rapid evolution of democracy during the last century

[1] *Cf* A. L. Lowell, op. cit., pt. 1.

and the extension of the suffrage would seem to imply that the people are becoming more capable of mastering the facts needed for an opinion on public matters, and hence better fitted to play a direct part in deciding questions of the day. No doubt they are, as a rule, far better educated both by the common schools and by political experience, but at the same time it is more difficult for anyone to become familiar with all the facts required for the solution of current problems. And the amount of information needed to form an intelligent opinion upon public affairs is constantly increasing. Nevertheless, the increasing extent of free expression of opinion on government policies and of public participation of the voters in the determination of such policies is regarded as an index of progress toward democratic government. In a democracy the safeguard to political action is a well-developed and crystallized public opinion. When it is thoroughly formed and becomes effective, it is the strongest force in any nation. Where free citizenship is one of the fundamental principles of a government it becomes a prime duty of the individual to understand and to share in the forming of public opinion on the vital questions relative to the actions and policies of the government. The extent to which public opinion yields to the governing class, which consciously molds public opinion to support its own ends, and the extent to which the governed hold in check the ruling classes, vary greatly in the leading countries of Europe and the Americas.

Public Opinion in Modern Governments

Germany.[1]—In Germany, prior to 1914, more than in any other of the leading countries of modern times, public opinion, as the effective force in government, had little opportunity for expression. Society was divided into distinct classes, and the machinery of government was in the hands of the upper class. This class was composed mainly

[1] *Cf.* Carlton J. H. Hayes, *A Brief History of the Great War* (The Macmillan Company, 1920), pp. 7–13.

of a military caste and an administrative bureaucracy. Civic freedom and general expression of opinion on political affairs among the masses were repressed. It was taken for granted that those who constituted the ruling class were to do the political thinking for all classes; and by the use of strict military methods, these ideas of the ruling class prevailed. The dominant idea was that the individual exists first and always for the interests of the state. The repression of opinion on the part of the average citizen in Germany was due in a large measure to the absolute authority of military leaders. The overthrow of the military autocracy and the entrance into public power of the socialists and radical groups appear to have opened the way for public opinion to become one of the potent factors in a reorganized political society.

England.[1]—Democratic as the government of England is conceded to be, the fact remains that there always has been and that there still is a ruling class whose opinions guide politics. In England, public opinion is largely fashioned by the press; in fact, the British public is often at its mercy. The press is simply the tool by which the practical politicians, professional writers, and professional men who are versed in the affairs of government form and guide public opinion and play upon the public temper in an irresponsible manner. The leading newspapers and political magazines in England support definite lines of political thought, and each has its particular bias. Facts and views are not published as such, but rather appear as interpreted by experts. These interpretations, as well as the politics maintained by the press, become the accepted source for general public opinion. Public opinion in England, says Bryce, "has been the opinion of the class which wore black coats and lived in good houses." To a great extent this is still the case. The responsibility of forming public sentiment belongs primarily to a particular class of society rather than to individuals. The English-

[1] See James Bryce, *The American Commonwealth*, especially ch. lxxxiii.

man, as an individual, does not feel the personal responsibility toward his government that the average American feels toward the government of the United States. In England, indifference is the usual attitude toward politics, except with the upper and professional classes, who are specialists in the manipulation of political machinery.[1]

However, the wishes and ideas of other classes are finding expression through their representatives in Parliament and through the extension of the electorate. The House of Commons, the representative body for the people, has lost some of its former high rank and power; and instead of serving as the chief index of action for the ministry, the latter is beginning to depend more directly upon the opinions and wishes of the electorate. Even though it is greatly influenced and consciously molded through press or platform by experts in politics, public opinion has become a restraining influence in England. The growth of the influence and power of the Labor party, and the definite formulation of policies backed by millions of this party, have brought a new factor into British politics which will have a determining influence on public opinion. Moreover, the recent electoral reform bill, which practically doubled the electorate, will likewise have a marked effect upon the trend of political affairs in England.

United States.—With the development of democratic principles and practices in the United States, public opinion has become a guiding factor in governmental affairs. And this condition has resulted in spite of the rather decided intention of certain founders of the American government that the government should control the people and that the people should not control the government. Instead of government's being directed, as Hamilton wished, by "the rich and wellborn," the will of the people has been growing steadily stronger. The force of public

[1] "The active politicians in England, those who take any part in politics beyond voting, are at present a tiny minority," Graham Wallas, *Human Nature in Politics*, p. 232.

opinion is recognized by any person or group of persons wishing to secure legislation or to select candidates for office. To accomplish desired ends, it is necessary for those interested to see that the public is given an opportunity to learn the facts about pending legislation or the qualifications of men seeking public office. The relation of the President to the people and to Congress, the relation of the members of Congress to the political parties, and the relation of the political parties to leaders of industries, make an intricate study in the formation of public opinion and its force in the administering of the American government.

The President, more than any other official, is responsive to public sentiment. To him the public looks for the ultimate expression of its will. On the other hand, by direct appeal to the people as a nation the President is able to accomplish some of his aims which might otherwise be thwarted. The President of the nation can often make an obstinate Congress respectful of his wishes by an appeal to the people through speeches, through messages, or through the press. Members of Congress, on the other hand, are controlled by public opinion to a less extent. They are particularly influenced by the sentiment of a few individuals or the small groups to whom they are immediately responsible. Too little consideration has been given to the methods of forming public opinion and the manner of bringing pressure to bear on public officials. Government will continue to operate, to a large degree, in the dark until the motives and interests at work in directing public opinion are more fully analyzed.

The government policies of the United States are becoming, increasingly, matters of individual responsibility. And while public opinion is created and molded largely to meet the desires and ambitions of groups of persons, nevertheless the average citizen takes a personal interest in and feels a responsibility for the acts of the government. And if the latter meet with disapproval, the citizen regards it a duty to assist in creating a new public opinion

to correct what is regarded detrimental either to his interests or to the welfare of society.

Public opinion, says James Bryce, wields its greatest power in the United States:

> Towering over Presidents and state Governors, over Congress and state legislatures, over conventions and the vast machinery of party, public opinion stands out in the United States as the great source of power, the master of servants who tremble before it.[1]

France and Other European Countries.—Public opinion exercises a marked influence over the government of France, but its scope is more limited than in England or in the United States. The French administrative system is composed of a hierarchy of officials who are, as a rule, professionally trained and who constitute a permanent governing class. These officers, after their appointment, are tried and disciplined in their own special administrative courts, and consequently are removed from popular control and direction. But since the administrative system is under the direction of the Cabinet and, with the Cabinet, subject to the control of the majority of the Chamber of Deputies—a popularly elected body—it is not likely that the administrative officials will long resist a well-formulated public demand.

Public opinion in other European countries depends largely upon the extent to which legislative assemblies and parliaments have gained in influence and power and upon the extent to which the people have been encouraged to participate in public affairs. In Switzerland, with the *landesgemeinde* of the small cantons and the initiative and referendum, the government is based fundamentally upon the popular will, which may with comparative ease be registered in the form of laws.

Where absolute monarchy still prevails, popular opinion is generally suppressed until some of the well-recognized human rights are accorded as the result of rebellion or

[1] *The American Commonwealth*, vol. ii, p. 267.

revolution. By a gradual process absolute monarchy has been giving place to constitutional monarchy; and, not infrequently, this form of government has been superseded by parliamentary government modeled after that of England or that of a republic somewhat in accord with the principles developed in the United States. One of the most notable examples of the introduction of parliamentary government based on the control and direction of the popular electorate is the development of responsible government in the British self-governing colonies—Canada, Australia, and South Africa.

South America.—Though the majority of South American countries have constitutions which have been carefully drafted and which are adequate in themselves for the needs of free states, yet real popular government does not exist. It is a significant fact that the majority of the people of South America have no sufficient background for local self-government, no adequate traditions of free government upon which to build a democratic society. Popular education has been sadly neglected, even in the progressive states, with the result that, considering South America as a whole, fully 70 per cent of the inhabitants are illiterate. The ignorance of the people and their general indifference to political and social questions make an effective public opinion impossible. The absence of public opinion is also due, in part, to the lack of racial unity and solidarity. "The sharp racial distinctions lead to antagonisms, prejudices, and social differences which make the formation of general public sentiment and the attainment of united action exceedingly difficult."[1] Furthermore, in the greater part of South America the caste system still prevails and there is a great gulf between extremes of wealth and luxury on one hand and extremes of poverty and misery on the other. The agricultural population is in a state of dependence and stagnation and the industrial system has been

[1] Jesse Macy and J. W. Gannaway, *Comparative Free Government* (The Macmillan Company, 1915), p. 659.

exploitive in character.[1] The powers of government have been utilized for the protection and promotion of the interests of the governing classes. While notable progress has been made in recent years, the establishment of democratic government in South America will involve fundamental social and economic changes. The great task of all the South American states is to develop a citizenship which is trained for its duties and conscious of its responsibilities in the formation of public opinion which free government involves. The general situation relative to the influence of public opinion was suggestively stated by James Bryce in terms which need only slight modification to-day:

> In the so-called republics of Central and South America a small section of the inhabitants pursue politics, while the rest follow their ordinary avocations, indifferent to elections and pronunciamentos and revolutions. In Germany, and in the German and Slavonic parts of the Austro-Hungarian monarchy, people think of the government as a great machine which will go on, whether they put their hand to it or not, a few persons working it, and all the rest paying and looking on. The same thing is largely true of republican France, and of semirepublican Italy, where free government is still a novelty, and local self-government in its infancy. Even in England, though the sixty years that have passed since the great Reform Act have brought many new ideas with them, the ordinary voter is still far from feeling, as the American does, that the government is his own, and he individually responsible for its conduct.[2]

The Methods of Forming Public Opinion

In modern governments the forming and directing of public opinion is an enormous task, requiring the expenditure of huge sums of money and the employment of many men and women. The leading methods of forming public opinion are through the press, the party organizations, numerous national and local organizations and societies, specialized private agencies, and official publications and documents.

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[1] Jesse Macy and J. W. Gannaway, *Comparative Free Government* (The Macmillan Company, 1915), p. 660.

[2] James Bryce, *The American Commonwealth*, vol. ii, p. 273.

The Press.—An important agency in the formation of public opinion is unquestionably the press, particularly the daily and weekly newspapers and magazines. Most of the facts, as well as the interpretation of these facts, are presented through the columns of the public press, and the average citizen receives and accepts a large part of his thinking on public questions as presented to him by the papers and magazines he reads.

The press through its news and editorial columns renders a great public service in the preparation of such facts and opinions as are necessary to form judgments on public questions. While partisan newspapers and organs of special interests frequently present only one side of an issue or view a problem with a manifest bias, a greater number of newspapers aim to deal impartially with most public controversies. By means of various press associations and other agencies the news of every quarter of the world is brought in inexpensive form to the door of the humblest citizen. And by means of the admirable news-gathering methods of the large dailies and their almost instantaneous methods of printing there is little excuse for citizens being uninformed on the public questions of the day. For its great services in the molding of public opinion on the problems of modern politics the press deserves high commendation. But in the development of the press as an agency in the formation of public opinion certain problems have arisen which are of serious concern to citizens who are so largely dependent upon newspapers for opinions and information on public issues.

Formerly the opinions of the press were expressed through the medium of the editorial column. Within recent times, the editorial column has become of less importance, and the news column a greater influence in molding public opinion.

In place of the newspapers which were locally owned and which voiced in large part the individual opinion or opinions of the owner or the small group who controlled

the entire policy of the paper, we now find large metropolitan dailies owned and controlled by stock companies and usually under the direction of interests which determine the editorial and news-gathering policy of the paper. This control is exercised not only by giving a particular color or trend to editorials and articles, but also by a kind of censorship which refuses to admit to the columns of the paper a type of news regarded as detrimental to the owners. For example, a paper which is owned and supported by the liquor interests will present a prohibition item so as to be agreeable to anti-prohibitionists. Similarly, a paper whose stock is owned largely by the stockholders and managers of public utilities will publish the news relating to public ownership prepared so as to suit the public-utility stockholder. It is unfortunate that the number of privately owned and directed papers has decreased in favor of the stock-company paper whose policy is likely to conform to the views of the special interests of the large owners.

The situation with respect to the formation of public opinion through the press is thus described by William Dudley Foulke:

> Public opinion is now influenced more by the facts contained in the news columns of the papers than by their editorials, and the editorials themselves are most effective when they present facts rather than mere arguments. The reader likes to do his own thinking. But even in the news columns the method of presenting the news and the failure to give both sides fairly and impartially may have just as powerful an effect as the best reasoned articles. Honest journalism is, therefore, of the utmost importance in the formation of a sound public opinion, and the loss of influence which our newspapers have suffered may be due in great part to the fact that the public has less confidence than it used to have in their sincerity and impartiality. This is not confined to the mere party organ nor to the so-called "yellow press." In quite a different class of newspapers there is a feature which inspires mistrust. The public does not know who is really in control. A large amount of capital is required for our great metropolitan papers and the men who own them are usually connected with other large interests. They are often stockholders and perhaps directors of railroads and banks and vast industrial concerns

which are seriously affected by many public movements. The public insists that the newspaper shall advocate reform measures; the interests of the proprietors demand that certain special great enterprises shall remain undisturbed; hence, news is perverted and arguments are twisted so as to give the appearance of patriotism and public spirit without its real presence. It is the fact that these motives and interests are concealed which is the real source of evil. The public has little to fear from the advocacy of anything by persons whose purposes are well known, but the secret control of a paper by some unknown power or its use of news furnished by a news bureau, similarly controlled, may well corrupt that public opinion which lies at the foundation of all popular government.

For instance, there was a bureau which furnished arguments against municipal ownership of public utilities for the purpose of protecting and promoting the particular enterprises in which those connected with the bureau were interested. This bureau would pay newspapers advertising rates for articles to be published as news matter in violation of the first principle of journalistic ethics.

During the investigation of the great life insurance companies of New York some of the companies, through a "telegraphic news bureau," sent paid items in their own favor which were fraudulently published as impartial news. . . .

The large advertisers in our most important newspapers have often secured the suppression of injurious facts in regard to themselves or to institutions with which they are connected.

These abuses infect free government at its fountain head, and newspapers, which are themselves the instruments of publicity, ought to be required both by public opinion and by specific law to furnish not only the names of all who are responsible for what is contained in their columns, but also, if demanded, the business connections of their directors and managers. Moreover, the furnishing of news by interested parties without disclosing such interest should be prohibited and visited with appropriate penalties.[1]

Since a large part of the information which ultimately reaches the public comes through the Associated Press agencies, it is extremely important that a fair and unbiased policy prevail in the dissemination of news. So important

[1] William Dudley Foulke, on "Public Opinion," *National Municipal Review*, vol. iii (April, 1914), pp. 248–49.

Investigate the ownership of stock and the influences affecting the editorial and news opinions of the leading newspapers in your community.

Report on the Associated Press and other news-collecting agencies for local papers.

are these associations that it is a serious question whether some kind of control or public supervision ought not to be exercised over them.

Party Organizations and Public Opinion.—The political parties maintain a complicated system of machinery which is constantly at work in an effort to create and direct public opinion that is favorable to the interests of the party. Various committees, organized to forward party interests, conduct extensive educational campaigns in order to put the claims of the party before the voters. In the process of instructing the voters, newspaper and magazine articles and advertisements, as well as specially prepared campaign leaflets and documents, are freely used. Articles designed for newspaper use are prepared under the direct supervision of the literary bureau, and, without charge, are sent to the newspapers for publication. Campaign documents are multitudinous in number and vary greatly in form. Cards, posters, pamphlets, speeches, and books are prepared and distributed. The campaign textbook is the most ambitious effort to place at the disposal of party workers the material and facts to influence the great mass of the voters. On the whole, the efforts of the parties to inform voters and to mold public opinion are the most thorough and extensive which have yet been devised, and parties are unquestionably among the chief agencies in the formation of public opinion on some of the great political issues.[1]

National Organizations and Societies.—When a group of persons becomes conscious that there is need of change or of the initiation of a new feature in the management of government or in any of its activities, it is customary for those persons to attempt to lead as many other persons as possible to the same point of view, so that in time public opinion will be strong enough to bring about the desired change. This is best accomplished by organized educational campaigns, for only through organization is public

[1] *Report on party agencies to create public opinion in your community.*

opinion able to become strong enough to be effective. "There is no public opinion that is not activity reflecting or representing the activity of a group or of a set of groups."[1]

Almost every government activity as now exercised had its beginning with small groups of persons particularly interested. And through an educational campaign the idea was carried to a larger number until sufficient sentiment was aroused to have it included as a part of the ordinary government activities. An illustration of this method is seen in the recent effort to establish a national department of education under a secretary who would be a member of the President's Cabinet. The bill presented to Congress was approved by numerous national organizations, including the National Education Association, the American Federation of Teachers, and the American Federation of Labor. However, public opinion on this issue has not reached the point where its efforts have met with success. An illustration of the way in which legislation may be the direct result of the agitation of a group was the passage of the Adamson Law regulating the hours of labor and other conditions of employment on the railroads. This act was passed on account of pressure exerted by the railway brotherhoods in a case of extraordinary emergency. Similarly, organized labor has brought pressure to bear on Congress and the President to attempt to curb the exorbitant rise in prices following the war.

Among the questions which have aroused great controversies and have necessitated the education of public opinion pro and con are those which center around the control of great industrial corporations, such as the Standard Oil Company and the Steel Trust. The National Association of Manufacturers, as well as other organizations representing the employers of labor, are ever on the alert to see that their interests are properly protected by

[1] A. F. Bentley, *The Process of Government* (University of Chicago Press, 1908), p. 223.

governmental means. A number of protective tariff acts resulted from the efforts of these organizations. On the other hand, the American Federation of Labor, through its methods of organization and education, has succeeded in safeguarding the rights of the laboring classes by laws and by means of redress before the courts. The National Grange of Patrons of Husbandry and Farmers' Unions are the organizations through which the farmer urges his demands for a share of government protection.

Most reforms have gone through similar stages of organization, education, and, finally, government action or supervision. The extension of the franchise to women and the control of the manufacture and sale of intoxicants have come largely through concerted efforts of local, state, and national organizations. The National Child Labor Committee and the National Civil Service Reform League have aided, respectively, in creating a public opinion sufficiently strong to demand special protection for children against the greed of employers or shiftlessness of parents and a protection against spoils politics.[1]

The number of organizations whose chief function is the formation of public opinion is legion, and it is impossible to attempt a detailed description of all of them, for every field of government activity has an organization of those who are interested in securing changes in existing methods of political control.

What is true of national organizations is similarly true of municipal organizations. Most cities of any size have clubs, civic organizations, or municipal leagues for the purpose of educating public opinion in the interest of civic reform. Most of these organizations are maintained by voluntary subscriptions and are not under government control. They exert, however, a great influence in local

[1] Consult especially the publications of such organizations as the American Association for Labor Legislation; Playground and Recreation Association; Public Ownership League; Russell Sage Foundation; Short Ballot Organization; New York Bureau of Municipal Research.

Report on the non-partisan league as an agency to form public opinion.

politics and assist in creating public interest in the projects for which they are organized, and their ultimate object is frequently to gain desired changes through legislative or administrative channels. In addition to these voluntarily supported organizations there have been established recently in several of the largest cities Bureaus of Municipal Research. The objects of these are to give city officials and citizens interested in government the benefit of what other cities are doing in the way of legislation and improved methods of administration. A useful service of this character may also be rendered by the municipal reference division of the public library, where civic information may be collected and classified for the use of officials as well as interested citizens.[1]

Specialized Private Agencies.—One of the most effective of the private agencies which have been organized to influence and conduct public affairs was the American Brewers' Association which maintained an organization in every state and used every means available to prevent the spread of local option and to forestall the more radical step of prohibition. Large sums of money were collected and spent in so-called pivotal states.[2] In a similar manner, the public utility interests have united in a campaign of education and of what one of their agents described as "the accelerating of public opinion" in support of the private ownership and management of public utilities. A private organization whose chief aim is the formation of public sentiment in favor of preparation for war and the adoption of universal military service is the National Security League. While some of these organizations may seem remote from government, it is only necessary to seek the source of new laws or new administrative policies to find how largely government is molded by such agencies.

Official Publications and Documents.—Within recent

[1] *Report on the organizations to influence and control government of some city with which you are familiar.*

Prepare a plan for the organization of a Bureau of Municipal Research.

[2] *Cf. The Breweries and Texas Politics*, 2 vols.

years a mass of information in the nature of legislative journals, compilations of statutes, executive and administrative reports, and a vast amount of statistical material has been prepared and published. Much of the material thus issued is utterly useless and represents a waste of both effort and money for publication and distribution. But along with these useless reports and documents are to be found publications of inestimable value for the collection of such facts and data as are indispensable for the formation of intelligent public judgments. It is much to be regretted that this very valuable material is often issued in public documents little used and is not brought to the attention of those who might be aided thereby. Frequently, the legislature establishes a commission to investigate a subject of proposed legislation and to make recommendations as a basis for constructive legislation. The reports of these commissions, frequently prepared under the direction of specialists, are exceedingly useful.

Miscellaneous Bodies Which Aid in the Forming of Public Opinion. — In addition to the public and semiprivate agencies which are engaged in the process of forming public opinion, there are other organizations or societies which exercise no direct influence upon public affairs, but which incidentally take part in the process of educating the public on political matters. Among such organizations notable examples are the national and local chambers of commerce, which give considerable time and thought to public matters. Many new movements for civic betterment receive their chief impetus from the associated chambers of commerce. Then, too, churches, although organized for a distinct religious purpose, aid at times in bringing about changes of political consequence, such as local option, prohibition, the regulation of vice, and the removal of unsanitary conditions. Likewise, the settlements and the charity organization societies designed to take care of dependents and defectives find themselves of necessity drawn into a campaign for the removal of the conditions which cause

vice, crime, and poverty. Such national associations as the American Medical Association and the American Bar Association take no small part in the formulation of opinions and policies within their respective fields.

The most striking fact about the formation of public opinion is the compact and well-defined organization of private and selfish interests. It frequently happens that divergent interests, such as those in control of the public utilities and of the liquor traffic, with a certain group of political workers and office seekers, are all interested in an administration which favors the policy of *laissez faire* or of the granting of special favors. Furthermore, these same interests frequently desire men in office who will be amenable to control and direction for their benefit. When these elements are definitely organized for political purposes, they constitute the basis of what is commonly known as "the machine." Unfortunately, the machine combines some of the best elements in a community with some of those interests which are detrimental to the public welfare, and by its thorough and well-disciplined organization controls such a large part of the electorate as to make it very difficult for those who oppose it to win, except for occasional periods. The agencies of reform and the organizations interested in public welfare are seldom able to combine and to work effectively to defeat those who have the support and backing of these special interests. And since government is to a large extent dominated by and carried out in accordance with the interests that control public power, it is very difficult indeed to create a fair and unbiased public opinion in opposition to that fostered by those interests desiring special government favors.

Women's Clubs.—A recent stimulus to an active public opinion is the influence exerted by the united effort on the part of women through their clubs. Especially is this true of those organized for the purpose of promoting social betterment and civic improvement, and to an appreciable degree of those which combine an active interest in civic

affairs with cultural study. State, national, and international federations of clubs have extended the work of the woman's club beyond the limits of given localities until its influence is felt the world over. In every department of social welfare, education, public health, recreation, better living and housing conditions, eradication of social evils, charities and corrections, social legislation and its enforcement, women have assisted in arousing a public opinion which demands and supports better and safer conditions for community life. Where their club work is backed by the use of the ballot results are more likely to be forthcoming. Especially are conditions improved where women have succeeded to public positions involving work in the fields of sanitation, recreation, and juvenile protection.

Many cities have profited by the work of women's clubs, and North Yakima, Washington, attributes to them the city's reputation of being the cleanest city in the United States. The Woman's City Club of Chicago with its numerous committees reaching into every kind of civic life is lending valuable assistance to that city. The vital purpose of the club is service, and it is recognizing the opportunities to realize its ideal. In the words of the president of the club, "What we hope for the Woman's Club is that it will be a lever which will mold, or help to mold, public opinion and which will be of use in calling attention of the administration to certain abuses and mistakes and, perhaps, through the force of public opinion, make the administration alter its plan of procedure."

Methods by Which Public Opinion May be Expressed

Representative Government.—While public opinion may be brought to bear upon the government and to influence public action in numerous ways, there is a growing tendency to provide official channels for the participation of the public in the affairs of government. Formerly, the petition, the remonstrance, and the request for the redress of griev-

ances were the methods of bringing public pressure to bear upon the monarchs. As these devices failed to meet the needs of the various interests seeking government favors or immunities from heavy taxation, the monarchs were compelled to call in and to consult in the determination of important policies representatives of the several interests or estates, as they were originally called. The consultation of these estates before going to war or before levying a new tax laid the foundation for modern representative government. And since different classes and estates had to be consulted, it became customary for the representatives to meet in groups. When the groups combined in England so as to form two chambers, a workable arrangement was hit upon which became a model for future representative bodies. With the decline of autocratic rule and the growth of the desire for popular participation in government the representative idea was extended, and popular assemblies were extolled "as the only means whereby popular government could be conducted on a large scale." Popular agitation generally took the form of a demand for a constitution and a representative body until all of the progressive nations had adopted legislative chambers with one branch, at least, elected by popular vote.

The representative principle is regarded as one of the greatest advances in the art of government. Through it popular government can be applied to large populations and over an extensive area. It is based on the theory that the people are unable or are incompetent to undertake the determination of all of their public affairs and that public opinion may be expressed through representatives who will reflect the general opinions of the electorate. England is usually cited as the best example of representative government. "The people of England have vested the entire exercise of their sovereign powers in a single agency—Parliament. That agency represents them in every capacity. The people themselves perform no political act

but that of selecting the members of this body."[1] And despite its many failures and apparent weaknesses, all governments which have in any degree accepted the idea of popular participation in lawmaking have accepted the representative plan. Moreover, the double chamber, which has been characterized "the fortuitous product of English political evolution," has been almost universally followed.

Though the representative principle is well established, there is a growing belief that representative assemblies have failed to fulfill the high hopes of their founders. Popular assemblies have become unwieldy; the great mass of public business has necessitated undue haste and at times ill-considered action. Furthermore, the growing complexity of public business renders it increasingly difficult to form an intelligent judgment on many of the questions presented to a lawmaking body. These difficulties are further complicated by contributing causes to the loss of confidence in representative assemblies; namely, the belief, first, that representatives are dominated by local interests and by log-rolling methods instead of a straightforward support of community welfare; and second, that the pressure of private interests is so strong as to weaken greatly the carrying out of public policies as expressed by the electorate in the selection of representatives. The decline in the esteem for legislative bodies has led to renewed efforts to influence legislative action through public opinion and the introduction of devices of direct government.

The methods of bringing opinion to bear upon and to influence representatives are by petition and remonstrance, initiative petitions, the recall, and publicity measures.

By the petition and the remonstrance the public may give a direct and definite expression of opinion on some specific issue and thus instruct representatives. The

[1] W. F. Willoughby, *The Government of Modern States* (The Century Company, 1919), p. 86.

method of petition and remonstrance, which is still extensively used, has not always proved effective; hence the devices known as the initiative, referendum, and recall have been adopted, by which more direct pressure may be brought to bear on representative bodies or whereby an appeal may be taken to the voters to reverse or supplement legislative action. Another important way of bringing public opinion to bear on representatives is through the columns of the papers, the magazines, and the public press generally, and particularly through such agencies as are occasionally formed to keep track of representatives and to publish their records, and thus through publicity to condemn or to give encouragement and support to their actions.[1]

Direct Government. Town Meeting.—In contrast with representative government is direct government, in which an assembly composed of those capable of political action meets for the transaction and the control of public business. This form of government is found in village meetings in China and Russia, in the *landsgemeinde* of Switzerland, and in the New England town meetings. The town meeting, found only in Michigan and in the rural parts of the New England States, is usually held annually with special meetings on petition of a fixed number of voters. Town officers are selected and legislation is enacted on a variety of local matters. Its most important duty is the levy of local taxes and the voting of appropriations. This form of popular assembly can be used only when the community is compact enough to permit citizens to come together easily and when the body is small enough to hear a man's voice. The advantages of the mass meetings are that the questions are local and familiar to everyone and that the function of inspection, supervision, and criticism may be directly exercised. Where the town meeting prevails, it is

[1] Examples of such organizations are the Municipal Voters' Leagues and the National Voters' League, an organization which publishes *The Searchlight*—a journal on the work of Congress and the other departments of the national government.

customary for measures to be initiated by selectmen as executive officers of the community. As a rule, they present proposals and defend their official conduct. The function of the assembly is to ratify or to reject their proposals and to subject the management of public affairs to criticism. For small communities in which the population is educated, intelligent, and homogeneous the town meeting offers a very interesting method by which the principles of direct democracy may be carried out with a considerable degree of effectiveness and by which popular opinion may direct and control all of the acts of the government. The town meeting and *landsgemiende* have not commended themselves as a feasible arrangement for large government units, and for this reason the representative system has generally been adopted. But representative government is being made more responsive to public sentiment through the devices of direct government, the referendum, the initiative, and the recall.

Referendum.[1]—The referendum is a political device whereby certain measures which have been drafted and approved by a state legislature or a constitutional convention are held in abeyance until the electorate either accepts or rejects them. Being negative in character, the referendum merely seeks the reinforcement of the majority of qualified voters in acts already passed by the legislature. There are two main forms of the referendum, the compulsory and the optional. The former is used in framing and amending state constitutions; the latter in the granting of the referendum by the legislature either by general laws, special provisions, or on the petition of a stipulated number of voters.

Compulsory.—The referendum has been used extensively in the process of constitution making in the United States. Drafts of constitutions were rejected and adopted in 1778 and 1780, respectively, in Massachusetts. And from the

[1] *Cf. Bulletins for the Massachusetts Constitutional Convention* (1917–18), vol. ii, no. 6.

latter date to the present, state constitutions and amendments thereto, with few exceptions, have been ratified by popular vote. Though the compulsory referendum has been in use for over a century, the extensive use of the method is being questioned as to its expediency and as to its ascertaining the real wish of the majority of the electorate. Indifference on the part of the voters is not unusual, presumably on the ground that they consider questions of constitution-making a technical part of state government in which they have little concern. As a rule, much less interest is shown in matters submitted to the people under this than under other forms of the referendum. It has been suggested that it is very probable that if amendments were approved by decided majorities in the legislatures and then submitted to an optional referendum by petition, much greater interest would be shown and more responsibility would be assumed by the electorate. At the same time, the large number of measures which now burden the ballot would doubtless be greatly reduced.

Optional.—In spite of the diversity of opinion among the states as to the desirability and legality of legislatures submitting acts to the electorate for approval, the plan of optional referendum has grown steadily in popularity until many state constitutions include provisions for its use, while other constitutions expressly prohibit it. The two kinds of optional referendum are the legislative referendum and the referendum by petition. As the names indicate, the referendum of legislative acts may be employed, first, by the choice of the legislature, and, second, by the choice of the people on the petition of the legally required number of voters.

Legislative Referendum.—The legislature, in referring its acts to the people, does so either by special grants of the referendum or by provisions of the general law. Included among the questions which have been submitted by the legislatures by special grants are local option, woman suffrage, and the holding of constitutional conventions.

The general laws of some states provide that, among other matters, the legislatures shall leave the form of government for cities, their charters and amendments thereto, and regulations for the public employment of labor to the approval of a majority of the voters in the locality affected.

Referendum by Petition.—South Dakota was the first state to include a provision in its constitution for the optional referendum by petition. And though similar action has been taken since 1898 by nineteen or more states, great diversity exists in the character and use of the optional referendum among the states which have adopted it. It is this form of the referendum which has occasioned the greatest discussion and differences of opinion. Some states require that all laws enacted by the legislatures shall be submitted for approval or rejection, while others limit the referendum to particular types of legislation.

California, Idaho, and Nevada declare it to be applicable to any law. Fifteen states make it applicable to any measure except those specifically prohibited. A dozen states concur in declaring exempt from referendum petition "laws necessary for the immediate preservation of public peace, health, or safety." In many states laws for the support of the state government or its various institutions, including the public schools, are excluded from the referendum's test.[1]

The limiting of the use of the referendum by an emergency clause has presented numerous problems, some of a more or less serious nature. To restrict the word *emergency* to the meaning given it in the constitution has been found difficult in not a few states, while the significance and limitations attached to the term vary greatly.

Initiative.—The initiative as a means for the expression of public opinion originated in Switzerland, where it has existed in some form for many centuries and where its development in the last century has attracted the attention of other democratic countries. Recently the initiative, on a plan similar to that of the Swiss cantons, has been

[1] *Bulletins for the Massachusetts Constitutional Convention* (1917–18), vol. ii, no. 6, pp. 202–203.

STATE-WIDE INITIATIVE AND REFERENDUM[1]

State	Date	Initiative for Statutes	Initiative for Const. Amend's	Referendum	Remarks
South Dakota..	1898	5% indirect	None	5%	Slightly restrictive amendment rejected 1914.
Utah.....	1900 (directory) Law, 1917	5% indirect; 10% direct (majority of counties)	None	10% (majority of counties)	Law enacted in 1917.
Oregon.....	1902 Extended 1906	8% direct	8% direct	5%	Restrictive amendment rejected 1912.
Nevada.....	Referendum 1904 I. & R. 1912	10% indirect	10% indirect	10%	
Montana.....	1906	8% (2/5 of counties) direct	None	5% (2/5 of counties)	
Oklahoma.....	1907	8% direct	15% direct	5%	Initiated measures require majority of votes at election.
Maine.....	1908	12,000 indirect	None	10,000	
Missouri.....	1908	8% (⅔ congressional districts) direct	8% (⅔ congressional districts) direct	5% (⅔ congressional districts)	Restrictive amendment rejected 1914.
Michigan.....	1908 Extended 1913	8% indirect	10% direct	5%	Immaterial amendment adopted 1918.
Arkansas.....	1910	8% direct	8% direct	5%	Rejected constitution of 1917 would have restricted.
Colorado.....	1910	8% direct	8% direct	5%	Restrictive amendment rejected 1914.
California.....	1911	8% direct; 5% indirect	8% direct	5%	Restrictive amendment rejected 1915.
New Mexico...	1911	None	None	10% (¾ counties)	25% may suspend law. Majority 40% vote at election to reject.
Arizona.....	1911 Extended 1914	10% direct	15% direct	5%	Restrictive amendment rejected 1916.
Idaho.....	1912 directory	None	None	None	No law yet enacted.
Nebraska.....	1912	10% (5% in 2/5 counties) direct	15% (5% in 2/5 counties) direct	0% (5% in 2/5 counties)	Affirmative vote of 35%.
Ohio.....	1912 Extended to federal amendments, 1918	3% plus 3% indirect (at least ½ percentage from ¼ counties)	10% direct (at least ½ percentage from ½ counties)	6% (at least ½ percentage from ½ counties)	Restrictive amendment rejected 1915.
Washington...	1912	10% (not over 50,000) direct and indirect	None	6% (not over 30,000)	Total vote must equal ⅓ at election.
Mississippi....	1914	7,500 direct	7,500 direct	6,000	Proposal submitted and failed 1912.

[1] Taken from *Illinois Constitutional Convention Bulletins* (1920), no. 2, pp. 81–82.

STATE-WIDE INITIATIVE AND REFERENDUM

State	Date	Initiative for Statutes	Initiative for Const. Amend's	Referendum	Remarks
North Dakota.	1914 Revised and extended 1918	10,000 direct	20,000 direct	7,000	30,000 may require special election on emergency referred law.
Maryland.....	1915	None	None	10,000 (not more than ⅓ from one county or Baltimore)	Referendum only.
Massachusetts.	1918	10 plus 20,000 plus 5,000. 30% vote. Indirect	10 plus 25,000. Two sessions 30% vote. Indirect	10 plus 15,000. 10 plus 10,000 for repeal of emergency or other measures. 30% vote.	Expressly inapplicable to numerous subjects. Not over ¼ signatures from one county.

adopted rather extensively in the states and cities of the United States. Through the initiative a specified number of voters may draft a law and obtain a popular vote on the law without recourse to the legislature. In contrast to the referendum, which is negative in character, the initiative is positive. The purpose of the former is to nullify objectionable acts passed by the legislature, the latter is designed to pass acts which the majority of the electorate desires, regardless of the sentiment of the legislature.

The initiative may be used in two distinct ways—the direct method and the indirect. Under the direct method the voters decide directly upon the measure. Under the indirect initiative the act is sent first to the legislature, and if passed without change by that body, it becomes a law; but if the action of the legislature is unfavorable, the measure is returned to the electorate for final action. Both forms of the initiative are used in amending state constitutions as well as in the enacting of statutory law.

In a majority of the states when a measure is proposed by popular petition, it then goes directly to the voters. The procedure in other states with the indirect initiative varies. South Dakota requires that an initiative measure

be forwarded to the legislature and through the legislature submitted to the voters. Maine, Nevada, and Michigan have an indirect initiative under which measures proposed by petition must be submitted to the legislature. The legislature may accept or reject the measure without change or may submit a competing or substitute proposal to the voters. Certain states permit a choice of either the direct or indirect method requiring, as a rule, a higher percentage of voters on the petition to submit directly to the electorate.[1]

In some commonwealths, the initiative is used not to the exclusion of action by the legislature, but simply to supplement it. The specifications as to the number of signers to the petitions, as to the relations of the legislatures to the initiative, as to the time within which action must be taken, all these and other details differ greatly among the various states, as is the case with the referendum.

Recall.—To the initiative and referendum as devices to secure popular control of government is frequently added the recall. This is a provision whereby a certain percentage of the voters may demand the recall of an elective officer or may require him to submit to the test of a new election. The recall is based on the idea that an officer is an agent of the public and that he can be turned out if a majority of the voters disapprove his conduct. There are two chief functions of the recall. In the first place, it provides a means by which the electorate may remove an official whose discharge of the duties of his office does not meet with their approval. And in the second place, the recall assists, as it has been aptly stated, "the officeholder in retaining a candidate's frame of mind," helps him to remember pre-election promises, and causes him to be alert as to the wishes of his constituents. The recall is conducted through a petition, similar to the procedure for the

[1] *Illinois Constitutional Convention Bulletins* (1920), no. 2, "The Initiative, Referendum, and Recall," pp. 84-85.

initiative and referendum, while the number of signatures, the content of the petition, the time of filing, the recall election, and the manner of recourse to the latter vary in different states. Very little use has been made of the recall, and most of the discussion has centered around the advisability of applying this remedy to the office of a judge. As a rule, the recall is applied only to legislative and executive officers, but Oregon and a few other states have extended the provision to judicial officers, and Colorado has applied the principle to judicial decisions on constitutional questions, rendering it possible for a majority of the voters to overrule the supreme court of the state on a constitutional issue.

RECALL[1]

State	Date	To whom applicable	Petition
Oregon	1908	"Every public officer."	25%
California	1911	"Every elective public officer."	12% 5 counties for state officer; 20% for local officer.
Arizona	1911, 1912	Public officers holding elective office.	25%
Colorado	1912	"Recall of judicial decisions."	5%
Colorado	1912	Elective officers.	25%
Idaho	1912 directory	Not to apply to judicial officers.	No law yet enacted.
Nevada	1912	Every public officer.	25%
Washington	1912	Except judges.	25% and 35%
Michigan	1913	Except judges.	25%
Kansas	1914	Every public officer holding either by election or appointment.	10% 15% 25%
Louisiana	1914	Except judges.	25%

Results of the Referendum, Initiative, and Recall.—While the states are moving somewhat slowly in the adoption of these democratic devices, the initiative, referendum, and recall have so commended themselves to the general public that they may be looked upon as satisfactory features of the plan to render popular government effective.

[1] *Illinois Constitutional Convention Bulletins* (1920), no. 2, p. 120.

In Switzerland, where the initiative has been in use for many years, there is a good opportunity to see the results of this device. The initiative on constitutional questions has been used rather infrequently. Since 1874 ten attempts were made to amend the constitution by the initiative, of which only three were successful.[1]

Earlier writers on the Swiss initiative [says Professor Brooks], have been too much inclined to condemn the institution because of the uses to which it was put during the first years of its existence. . . . Whatever grounds for criticism may be afforded by the earlier experiences of the Swiss with the initiative, it seems to have justified itself from 1900 on. The measures submitted during the latter period were moderate and progressive. Those which failed laid an educational foundation for reforms which are likely to be made in the not distant future, while the two successful amendments represent substantial achievement. The permanence of the present constitutional initiative is assured, and there is considerable advocacy of the proposition to extend it to the enactment of ordinary federal legislation.[2]

In the cantons, only fifteen measures have been passed in eighteen cantons in a period of twenty years, or less than one measure per canton.

From 1874 to 1917 thirty-one legislative projects were referred to the voters of the Swiss Republic. Of these nineteen were rejected and twelve approved. The general result of

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[1] List of Swiss Constitutional Amendments submitted by Initiative 1874–1917:

1880, Total revision in order to create bank-note monopoly. Rejected.
1893, Method of slaughtering animals. Accepted.
1894, Right to work, duty of state to provide employment. Rejected.
1894, Dividing part of Federal customs revenue among cantons. Rejected.
1900, Election of National Council by proportional representation. Rejected.
1900, Election of Federal Council by popular vote, increasing its membership to nine. Rejected.
1903, Basing apportionment of National Council on citizen population exclusively. Rejected.
1908, Prohibiting absinthe. Accepted.
1908, Federal regulation of water power. Accepted.
1910, Election of National Council by proportional representation.

From *Government and Politics of Switzerland*, by R. C. Brooks (copyright, 1918, by World Book Company, Yonkers-on-Hudson, New York), pp. 145–6. Used by permission of the publishers.

[2] *Ibid.*, pp. 147, 152.

direct legislation in Switzerland is that it "has not realized all the extravagant anticipations of its friends. But on the other hand it has completely falsified the dismal prophecies of chaos and revolution uttered by the conservatives of an earlier period. It has become a vital and freely functioning part of the Swiss political organism."[1] Switzerland was the only nation to submit to a referendum the question of joining the League of Nations. After a vigorous campaign by both advocates and opponents of the League the proposal to join was carried by a vote of 415,819 for to 323,225 against, with about 76 per cent of the voters participating.

In the United States the compulsory referendum upon constitutional questions and the voluntary reference of measures by petition result in the submission to the voters of a large number of proposed laws. The extent of such submissions may be indicated by the following tables:

SUBMISSIONS BY YEARS[2]

Year	Total Submissions	Total Adopted
1900	2	2
1902	3	3
1904	6	3
1906	16	12
1908	33	19
1909	3	. .
1910	66	18
1911	6	3
1912	130	58 (a)
1913	17	12
1914	188	64 (b)
1915	18	1
1916	98	33
1917	22	10
1918	100	64
1919	9	5
	717	307

(a) Three of these held not adopted by Supreme Court.
(b) One of these held not adopted by Supreme Court.

[1] Robert C. Brooks, *Government and Politics in Switzerland* (The World Book Company, 1918), p. 164.
[2] *Illinois Constitutional Convention Bulletins* (1920), no. 2, pp. 102-103.

TOTAL NUMBER OF MEASURES SUBMITTED

State	Years of Submissions	Total Submissions	Cons't Amendments				Laws				
			Proposed by Legislature	Proposed by Initiative	Total Amendments Submitted	Total Adopted	Proposed by Initiative	Referred by Legislature	Referred on Petition	Total Laws Submitted	Total Adopted
Arizona	1912–18	54	6	15	21	11	18	1	14	33	22
Arkansas	1912–18	19	6	5	11	6[1]	7	..	1	8	3
California	1912–18	98	51	15	66	29	15	8	9	32	12
Colorado	1912–18	61	8	17	25	8	24	1	11	36	12
Maine	1908–18	17	11	..	11	6	1	..	5	6	3
Maryland	1916–18	2	2	..	2	2	..	..	..	..	..
Michigan	1914–18	16	12	4	16	10	..	..	..	..	..
Mississippi	1918	2	1	1	2	..	..	..	..	..	..
Missouri	1910–18	48	29	14	43	1	..	1	4	5	1
Montana	1908–18	23	9	..	9	5	9	4	1	14	9
Nebraska	1914–18	10	3	4	7	2	..	1	2	3	1
Nevada	1908–18	12	11	..	11	11	..	..	1	1	1
New Mexico	1912–18	8	7	..	7	5	..	1	..	1	1
North Dakota	1916–18	14	5	7	12	12	..	..	2	2	2
Ohio	1913–18	21	6	12	18	6	..	..	3	3	..
Oklahoma	1908–18	45	10	23	33	12	6	2	4	12	7
Oregon	1904–19	170	37	43	80	31	62	12	16	90	35
South Dakota	1900–18	73	50	..	50	27	9	..	14	23	8
Utah	1918	3	3	..	3	3	..	..	..	..	..
Washington	1914–18	21	2	..	2	..	9	3	7	19	3
		717	269	160	429	187	160	34	94	288	120

[1] Three held not adopted by supreme court.

Out of the total of seven hundred and seventeen measures submitted according to the preceding table, four hundred and twenty-nine were proposed constitutional amendments upon which the referendum is compulsory.[1] Approximately one half of the measures submitted are then the direct result of popular petitions.

Many summaries of votes on measures have been prepared and numerous attempts have been made to estimate the results of the vote upon measures submitted through the initiative and referendum. But few satisfactory conclusions can as yet be formed.

The local referendum in cities and counties has been found more satisfactory than the statewide referendum, since there is better opportunity for discussion and the for-

[1] *Illinois Constitutional Convention Bulletins* (1920), no. 2, p. 105.

mation of a real public opinion. Local issues are not so complex, and a larger proportion of the voters show an interest in the measures. Local questions which are referred to the electorate are chiefly the incorporation of towns and the making of city charters, the borrowing of money, and the provisions of public franchises. But in the referendum on local questions as well as in the statewide referendum a popular vote is of little value:

(1) if the questions submitted are so trivial or so local in character as not to be of interest to those to whom they are submitted.
(2) if the questions are so complicated and technical that the voter has no satisfactory means of informing himself regarding them.
(3) if the questions are submitted in such great number that the voter, even if he might possibly render a satisfactory judgment upon any one of them, cannot inform himself regarding the merits of all the measures upon which he must pass.[1]

In forming a conclusion upon the results of the initiative and referendum it is impossible to separate the compulsory referendum on constitutional questions from the optional referendum by petition. The former has been in use for many years, whereas the latter is of recent origin. Since constitutional provisions must be referred to the voters in almost all of the states and since a large proportion of measures submitted are in this class, the changes resulting from the adoption of the optional referendum may readily be exaggerated. The laws proposed by the initiative cover a range of subjects as wide as those which come before a state legislature, and about one half of the proposals submitted to the voters under the initiative are disapproved. It is interesting to note the general reaction of the composite voter. In the words of a close student of the votes on measures in the state of Oregon, where these devices have been in use for a number of years:

. . . the composite voter appears to be one jealous of his own rights and privileges, as most men are; resolute to see his government actually, as

[1] *Illinois Constitutional Convention Bulletins* (1920), no. 2, p. 112.

well as theoretically, deriving its just powers from the consent of the governed, and to see politics clean and fair; desirous of improvement of his institutions; open to thoughtful advice and mindful of well-reasoned opinion as to the means of betterment, but averse to visionary innovations; reluctant to create new offices, and stingy with salaries to public officers, but yielding that point occasionally when involved with some higher good; nearly abreast of the best thought of the time in matters of social and industrial regulation, but lagging behind, and a bit muddled, in economics; and, until he reads the title clear of would-be spenders of the public money, saving with it to a fault.[1]

As to the character of legislation, it is claimed that the acts passed under the initiative are in some respects superior to those enacted by the legislature. This results from the fact that the persons most vitally interested in the measures are the persons who draft or cause to be drafted the bills which are presented for enactment. Then, too, the initiative method, with the extended discussions which usually accompany the presentation of a bill, results more often in framing a law in such a manner that its purpose is accomplished than does the process of ordinary legislation.

Possibly the most important result of the initiative is the effect upon the voter himself. The discussions which occur on the street, in the club, or in the public hall reveal the serious attitude of the voter toward a pending measure. As a rule, more interest is shown in the discussion of bills to be voted on than in the consideration of candidates for office. The earnestness and candor as well as the information imparted in the former are felt to be more sincere than in the latter. The educational advantages of a free and general consideration of arguments pro and con cannot be overestimated. With an opportunity to participate given to everyone who will, the kind of legislation enacted becomes a matter of personal responsibility. The problem of popular government, according to President Lowell, is

> . . . whether direct legislation is so adjusted to the means of forming a real public opinion that the people can decide intelligently all the questions

[1] Richard W. Montague, on "The Oregon System at Work," *National Municipal Review*, vol. iii (April, 1914), p. 265.

presented to them, without unusual effort and without the aid of people who find a profit in steering them. Badly adjusted machinery is the opportunity of the boss and the combination. Professional politicians obtained control of elections because the people were called upon to do more than they could do without help, and the more the people are asked to decide questions in which they are not as a whole seriously interested, the greater will be the opening for the boss and his allies.[1]

Though a very appreciable interest has been shown in direct legislation, it has not, as many feared would be the case, endangered the work of representative legislation. In Oregon during a single year 49 measures were passed of the 108 submitted, while the legislature enacted not fewer than 1,624 of the 4,429 bills which it considered. At the conclusion of an excellent summary of the results of the initiative and referendum in Oklahoma the writer observes that

> . . . the prophecy that the initiative and referendum would lead to hasty and radical legislation has not been fulfilled. The initial petition has been filed on one hundred and ten questions, but only forty-five went so far as being voted upon. Many of the petitions were never seriously considered, and were filed merely for political purposes; in others the petition failed because of the inability to secure signatures. That the initiative and referendum have accomplished nothing extraordinary is self evident; that they have caused any political instability, time alone must determine.[2]

The fear that the recall would be abused and would result in frequent changes in public officials seems not to have been realized. Although in force in many cities and in a considerable number of states, it has been invoked infrequently. The fact is coming to be recognized that "it is not its actual use, but the knowledge that it can be used, which makes officers responsive to the public will."[3]

[1] *Public Opinion and Popular Government* (Longmans, Green & Co., 1914), pp. 230–231.

[2] John H. Bass, "The Initiative and Referendum in Oklahoma," *The Southwestern Political Science Quarterly*, vol. i, no. 2 (September, 1920), p. 125.

[3] F. A. Cleveland, *Organized Democracy* (Longmans, Green & Co., 1913), p. 384.

Ways of Rendering Public Opinion Effective.—The vague, indefinite, and ineffective character of public opinion is generally conceded and commented upon, but recently much thought has been given to the methods by which public opinion may be rendered effective. If the individual, as a citizen and a voter, is free to think and express his thoughts and by means of the ballot participates in all phases of government activities, how can such public will be effectively formed and made directly powerful in carrying on public affairs? The ancient rights of the citizen, the right of petition, the right to carry arms, and the right of assembly, need now to be replaced by a more constructive performance of public duties and responsibilities. These constructive duties and responsibilities have been summarized by Doctor Cleveland as follows:

1. The duty to organize and assemble for the purpose of determining welfare needs and for the purpose of providing whatever means may be necessary to develop in the minds of the people a common appreciation of what should be undertaken by the government to promote general welfare.

2. The duty to organize and assemble for the purpose of impressing the ascertained will of the people on the electorate.

3. The duty to enforce the constitutional requirements that records of public transactions be kept and to provide the means necessary for making the facts known about what the government is doing, as well as what it proposes to do.

4. The duty to instruct officers, as corporate servants, and to remonstrate with corporate servants whenever they may seem not to be doing what is demanded to protect the welfare of the state.

5. The duty to protect public servants, who are doing their duty, against false accusations and against attacks by persons who, using their rights of free speech and free press, are seeking, by misinformation and by diverting public attention from the truth, to subvert the government or its agencies to personal or partisan ends.[1]

The necessary steps in rendering public opinion effective seem to center, first, in better ways of presenting fair, unbiased, and complete facts and opinions to the public; second, in better, more thorough, and more extensive edu-

[1] F. A. Cleveland, *op. cit.*, pp. 99–100.

cation in public affairs; and third, in a more effective organization to bring public opinion to bear continuously and unequivocally upon all officers and organizations engaged in government work. In each of these steps substantial progress has recently been made, but in each there is yet to be attained that foresight and constructive planning which alone will render public opinion an effective factor in the growth of popular government.

The Problem.—The real problem and difficulty involved in the relation of public opinion to popular government was admirably stated a few years ago by President Wilson:

> The political discussions of recent years concerning the reform of our political methods have carried us back to where we began. We set out upon our political adventures as a nation with one distinct object, namely, to put the control of government in the hands of the people, to set up a government by public opinion thoroughly democratic in its structure and motive. We were more interested in that than in making it efficient. Efficiency meant strength; strength might mean tyranny; and we were minded to have liberty at any cost. And now, behold! when our experiment is an hundred and thirty-odd years old we discover that we have neither efficiency nor control. It is stated and conceded on every side that our whole representative system is in the hands of the "machine": That the people do not in reality choose their representatives any longer, and that their representatives do not serve the general interest unless dragooned into doing so by extraordinary forces or agitation, but are controlled by personal and private influences; that there is no one anywhere whom we can hold publicly responsible, and that it is hide-and-seek who shall be punished, who rewarded, who preferred, who rejected,—that the processes of government amongst us, in short, are haphazard, the processes of control obscure and ineffectual. And so we are at the beginning again. We must, if any part of this be true, at once devote ourselves again to finding means to make our governments, whether in our cities, in our states, or in the nation, representative, responsible, and efficient.[1]

To sum up the conclusions of this keen observer of political affairs: The public was never better informed, nor more intelligent, never more eager to make itself felt in the

[1] "Hide and Seek Politics," *North American Review*, vol. cxci (November, 1910), pp. 588 ff.

Formulate a plan to render public opinion more effective in your community.

control of government for the betterment of the nation than it is now. But the public was never more helpless to obtain its purposes by ordinary and stated means. It has to resort to convulsive, agitated, almost revolutionary, means in order to have its way. In short, the definite constructive organization by which public opinion can be made vital, pervasive, and effective remains as yet in large part to be accomplished. "The concern of patriotic men is to put our government again on its right basis by substituting the popular will for the rule of guardians, the processes of common counsel for those of private arrangements." [1]

SUPPLEMENTARY READINGS

A. F. Bentley, *The Process of Government* (The University of Chicago Press, 1908).

A suggestive analysis of the principles and factors involved in the formation of public opinion.

James Bryce, *The American Commonwealth* (Revised Edition), Vol. II, Part IV, "Public Opinion" (The Macmillan Company, 1910).

A clear and informing comparison as to the nature and influence of public opinion in England and in the United States.

———, *Modern Democracies*, (The Macmillan Company, 1721)

F. A. Cleveland, *Organized Democracy* (Longmans, Green & Co., 1913).

Parts III and IV . . . deal particularly with the relations of the electorate to government.

A. Lawrence Lowell, *Public Opinion and Government* (Longmans, Green & Co., 1914).

The best discussion of the nature of public opinion and the methods of expressing public opinion.

J. D. Barnett, *The Operation of the Initiative, Referendum, and Recall in Oregon.*

A useful account of the Oregon system at work.

Illinois Constitutional Convention Bulletin (1920), No. 2, "The Initiative, Referendum, and Recall."

Bulletins for the Constitutional Convention, Massachusetts (1917–18), Vol. I, No. 6, "The Initiative and Referendum."

These bulletins furnish short brief summaries of existing laws on the initiative, referendum, and recall, with an appraisal of the results of their adoption by the states.

[1] "Hide and Seek Politics," *North American Review*, vol. cxci (November, 1910), p. 591.

CHAPTER II

POLITICAL PARTIES AND GOVERNMENT[1]

Political Parties in Modern Governments

Modern governments in all but a few countries are under the control and direction of political parties. Political parties as we find them to-day are a recent phenomenon and have been an outgrowth of the increase of popular participation in public affairs. The electorate in all democratic countries is formed into fairly well-defined and compact groups of those who think along similar lines and who unite to secure control of the government. Party organizations had their first and most effective development in England, where the Cabinet and party system developed outside of the formal machinery of government. The Cabinet or parliamentary system of government as it evolved in England normally presupposes two great parties—one known as the government and the other, the opposition. All countries accepting democratic institutions have found it necessary to form something in the way of a party system, and constitutions frequently make definite provisions for the co-operation of parties in government. With respect to the participation of the electorate in political action, it is observed that citizens may be divided into five main groups:

1. Reactionaries—who seek to return to the practices and the institutions of the past.

[1] Secure:
National Campaign Textbooks—Republican, Democratic, Socialist, and other national parties.
Copies of election laws, rules, and regulations for the state.
Ballots for local, state, and national elections.

2. Conservatives—who desire to retain existing institutions.
3. Liberals—who propose to reform existing institutions.
4. Radicals—who desire to abolish existing institutions and establish a new order.
5. Extreme Radicals—who oppose the existing order and favor revolutionary methods to bring about desired changes.

There are different degrees of opinions represented in each of these groups, ranging from the extreme advocates to the moderate and indifferent. These five groups, with varying degrees of distinctness, may be found as the basis of party divisions in most European countries.

When the reactionaries and conservatives temporarily agree to combine for certain purposes, and likewise the liberals and radicals join, a working arrangement is formed for two well-defined parties. The two-party system, however, while it has had a fair degree of success, seems to be breaking up into small groups, a number of which must unite to have sufficient adherents to control the government. This division into many groups has been characteristic of parties in France and Germany and other European countries, and now seems to be replacing the former two-party system in England. An indication of the variety of the groups may be gathered from the list of parties in recent elections in England and France.[1]

Party Divisions in the United States

In spite of the plans and wishes of the constitution-makers, parties were inevitable in the United States. The very structure of the government necessitated the division of the voters into groups and the maintenance of strong organizations under the guidance of experienced leaders and with local organizations and committees in every part of the Union. A political party, from the American standpoint, may be defined as a more or less permanent organiza-

[1] *Consult the "Statesmen's Year-Book" and current magazines for present party divisions in England, France, Italy, Germany, and Japan.*

tion of individuals, or groups of individuals, fluctuating in personnel and numbers, united by common principles or a common policy, and having for its immediate end the control of the government through the carrying of elections and the possession of office.

In the United States, as in England, the conspicuous fact with regard to political parties is the dominant control exercised interchangeably by the two leading political parties. Minor parties have come into existence and have continued for short periods, and the tendency within recent years has been for the electorate to divide into small groups which, in the growth of their power, seem to indicate the weakening of the two-party system which has been dominant with but few exceptions from the election of Jefferson to that of Wilson. The chief existing political parties are the following: (1) The Democratic party, which is the successor of the old Anti-Federalist party has followed in the main the doctrine of a strict interpretation of the Federal Constitution, the principle that the rights of the states should be preserved and interfered with as little as possible, and that government should be limited so that the individual may be allowed a large measure of freedom. The party has recently been opposed to a high protective tariff, to imperialism, to commercial diplomacy, and to the extension of the powers of the Federal government by means of executive and judicial construction. (2) The Republican party, which is the successor of the old Federalist and Whig parties, has favored a liberal and rather loose interpretation of the Constitution, and as a consequence, an extension of the powers of the Federal government by legislative acts, by executive authority, and judicial construction. It has stood for the rights of the nation as against the states. The party has been the champion of a protective tariff, of national improvements under the authority of the Federal government, of colonial expansion, of liberal pensions, of negro suffrage, and of a gold monetary standard. The position of the Republican party was

strengthened and made more secure by the advocacy and adoption of measures tending to benefit commercial and capitalistic enterprises. It is a notable fact, however, that parties change their policies when placed in charge of the government; and despite former party principles, such policies are adopted as appear to accord with the prevailing public sentiment. Strictly speaking, the main basis of cleavage is that normally defined as the "ins" and the "outs"—namely, those in control of public power and those in opposition thereto.

Among the minor parties, the most important is the Socialist party, organized in 1900. It advocates, among other things, government ownership of lands, railways, telegraph lines, and other means of production and transportation. Within recent years, those holding progressive and radical views have at times bolted the Democratic and Republican parties. In 1912, such a radical wing, known as the Progressives, left the Republican party and stood for its own candidate, thus assuring the election of Woodrow Wilson. There is an increasing tendency for parties in the United States to divide on issues of liberalism and radicalism. The liberals and radicals, who favor social reform and welcome changes in government and administration, are pitted against the conservatives and reactionaries, who support the continuance of the existing order and the protection of property and vested interests. This division seems to indicate the ultimate breaking up of the old parties into new divisions somewhat similar to the radical and conservative parties of England and other European countries. It was this division which was forecasted by Woodrow Wilson in his first campaign, when he declared himself a radical rather than a democrat.[1]

Parties and the Separation of Powers.—Owing to the fact that the powers of government are divided among three departments in state and nation, and because of the division

[1] *Report on the party divisions in the last presidential campaign. See recent "World Almanac."*

of powers between the Federal and the state authorities, party government has proved indispensable in the operation of the government of the United States. It is necessary, therefore, that any party which desires to carry out a policy shall secure unity in the three departments of the Federal government and also in the state governments through which national functions must often be performed. A party finds it essential not only to secure control of the Federal government, but also to become powerful and influential in the states where supplemental legislation is often required and where effective action can be secured only by party harmony. Thus the theory of the separation of powers has tended to render party control necessary to secure harmony between the legislative and executive branches of the government. Without co-operation between the legislative and the executive departments, the machinery of government cannot be successfully operated. In England the legislative and executive departments are combined, and with the aid of the Cabinet unity is secured in legislation and administration. In the United States, such co-ordination must be obtained outside of the law. Instead of establishing unity and harmony in a formal and constitutional manner, they are obtained in an informal and extra-constitutional arrangement. The possibility of a breach between the executive and the legislature is thus prevented, except occasionally, by political parties. In accomplishing unity, the party system fulfills its best end and thereby prevents the turmoil which would result from a lack of harmony between the legislative and the executive authorities.[1]

Extra-Legal Growth of Parties in the United States.—In no other country have party organization and machinery been developed to such a degree as they have been in the United States. This remarkable growth has taken place contrary to the intentions of the makers of the Federal

[1] For an interesting presentation of this point of view consult F. J. Goodnow, *Politics and Administration* (The Macmillan Company, 1900).

Constitution, who believed that political parties were undesirable. But notwithstanding the fact that the Constitution and laws were designed to operate without parties, the advisability and necessity of some form of political organization for the purpose of controlling the government were early admitted and acted upon by the leaders of opposite interests and diverse habits of political thinking. The machinery which was to put into operation this extra-legal method of directing the government, and which has continued to function as such, involves some of the most interesting and important phases of popular government. Just how this extra-legal machinery may best be made to serve the purpose which occasioned its incipiency, is a matter of moment to persons prominent in public affairs and should be of as much interest to the average citizen.

The characteristic phases of this informal party organization have been the growth of the caucus, the convention, and more recently the direct primary.

The Caucus.—Informal and semisecret caucuses seem to have been held frequently in Colonial and Revolutionary times, and were used as party devices very early in the political history of the United States, as is evidenced by the comment of John Adams relative to the Caucus Club of Boston.[1] At first, the chief purpose of the caucus as a form of party organization was the nomination and election of candidates to offices, for which no provision was made in laws and constitutions. Various methods were followed in the nomination of officers, the most important of which were self-announcement (where a person presented himself as a candidate for office), and selection by caucus. The informal caucus, which, according to Adams, met and nominated party candidates, was superseded by the more

[1] "In the garret of Tom Dawes," said Adams, "they smoke tobacco until you cannot see from one end of the garret to the other. There they drink flip, I suppose, and they choose a moderator who puts questions to the vote regularly; and selectmen, assessors, collectors, fire wardens, and representatives are regularly chosen before they are chosen in the town." John Adams, *Works* (Boston, 1856), vol. ii, p. 144.

definite system of nomination provided by the congressional caucus for the Union and by the legislative caucuses for the states. The nominations were made, as a rule, by similar methods, each party in the legislature gathering in the caucus and selecting candidates for the various national and state offices.

On account of the secret methods which were practiced and of the fact that the caucus was clearly not in line with the constitutional provision for the election of President, the caucus proved unpopular from the beginning. It became the center of attack by the growing Democratic party of the pioneer states of the West, and was the issue in the campaign for the election of Jackson when he rallied his supporters on a platform to overthrow King Caucus.

Although it is supposed to have been abolished officially, the caucus as a device for the conduct of business within the party continues as one of the most powerful agencies of government. Not only does a small group of each party prepare the program of action for the party and submit it for adoption, but some very important government functions are in actual practice performed by the caucus, after which mere formal approval is publicly accorded. The caucus selects the Speaker of the House of Representatives, approves the selection of the chairmen of all of the important committees in Congress, and outlines the main policies to be formulated into law before a regular session of Congress convenes. And then, in solemn and formal manner, the acts of the majority caucus are passed as the acts of each House of Congress, the minority usually registering its opposition, the main lines of which have also been determined in the caucus of the minority members. Likewise, the party program in state, county, and city is prepared in local party caucuses. Thus the effort to kill King Caucus merely resulted in checking some of the power of this ancient political device.[1]

[1] *Report on the work of the caucus preceding (a) the last session of a state legislature, (b) the last regular session of Congress. Consult newspapers.*

The caucus as a regular system of nomination in both state and nation, was overthrown, however, in the latter part of the decade from 1820 to 1830. For a while there was no definite system of party organization, and a rather informal method of nomination was pursued, candidates being placed in nomination by local or state conventions or by mass meetings. With the decline of the legislative caucus came a feeling of distrust for party leaders and a refusal to do their bidding. There was an urgent demand for a more democratic organization of parties, and the process of nomination then in use was objected to as being unauthoritative. This general dissatisfaction with the congressional caucus and with the informal methods of nomination which followed after the abandonment of the formal caucus led to the formation of the nominating convention, which has since become so important a factor in American politics.

The Convention.—The first national convention was held by the Anti-Masonic party in 1831. The idea proved to be so popular that in 1832 both of the leading parties, National Republicans and Democrats, called conventions. From this date, with few exceptions, the candidates of all parties for the Presidency and the Vice-Presidency have been nominated by conventions. The convention system, which turned out to be advantageous for national political purposes, was soon employed for similar purposes in state and local organizations, and these local conventions became closely connected with the national conventions.

The three functions which the convention performs are, first, to formulate party rules and procedure and to select candidates for the important offices in the states and in the nation; second, to adopt statements of principles and policies commonly known as the party platform; third, to choose permanent party officers and the committee or committees to direct the campaign for the election of a party ticket and to provide for the calling of subsequent conventions. It thus became *the legislature* for the party,

to which was delegated the authority of determining party policies and of choosing party officers. The basis for representation in the convention is either the county or the legislative district. Delegates may be apportioned among the counties or districts either according to population or according to the respective number of votes cast at the last election. The convention system very soon exercised control over all of the important offices, divisions, policies, and administration of government in the United States.[1] Though the convention system has succeeded the informal and formal caucuses of an earlier period, the direction and control of the conventions still lie within the domination of an inner circle not so vitally different from the old-time caucus.

Party Committees.—Under the convention system, there developed a hierarchy of committees which constitutes the extra-legal political machinery by which party interests are guarded and by which party campaigns and elections are conducted. At the top of this hierarchy is to be found the national committee, which is composed of a party representative from each state and territory, and at the head of which is a chairman who is the recognized leader of his party. The national committee provides for the national convention, formulates the method of procedure, and diffuses propaganda necessary to a successful party campaign. Below the national committee are the congressional committee, which has charge of party interests at the congressional elections between presidential campaigns; the state central committees; and the assembly, district, county, city, and ward committees. Forming a network reaching from the centers of political activity to the most remote corners of the country, this extra-legal machinery is ever in action, promoting the interests of the party and looking toward the election of the men of its choice. The personnel of these committees usually con-

[1] *Report on the preparation for and the holding of the recent national convention. Consult newspapers and magazines.*

sists of men who are not so much desirous of political positions as of political favors, or of the control of the disbursement of political funds. It is largely this aspect of the committee system which has brought it into disrepute in many states. Though it is generally conceded that the work done by the various committees could not easily be done by other than comparatively small bodies of men, and that successful party government necessitates some such plan, the extra-legal phase of the committee system has come into such disrepute that steps have been taken to render the state committees more directly responsible to the electorate.

With the introduction of the party machinery under the convention system came the acceptance of the principle of rotation in office, with the idea of short terms and frequent elections. The practice followed by Jackson and his successors in the Presidency became general throughout the states —namely, for the politicians to control the conventions with a view to the distribution of the spoils. Availability was made the first qualification for candidates to office. With this practice came an exaltation of party loyalty and the growth of a class of office-seekers. Thorough organization and effective party discipline were accomplished before the Civil War. The war resulted in the strengthening of these organizations. The North perfected its machinery to hold the government under its control; the South organized as a solid South to fight reconstruction policies. In the conventions centered the great contests for political power and preferment. Despite the fact, then, that efforts have been made to regulate the conduct both of the caucus and of the convention, to limit their action and even to abolish them entirely, they both continue to persist as influential parts of the political machinery. Whether to abolish the caucus and the convention systems or whether to continue to retain them as permanent organs of party government in their present form or in a modified form, are issues on which there is a wide diversity of opinion.

If caucus and convention are to be retained, it then becomes necessary to determine what functions can properly be accorded to these party devices and to define the regulations by law under which they may operate.[1]

Defects of the Party System

With the rise and growth of parties in the United States have come corrupt and undesirable practices. To such an extent have these developed that radical reformers would eliminate parties. Though the founders of our nation, fearing the evils which accompany political divisions, made no provisions for parties in the fundamental law, they were not only inevitable, but also have served a valuable purpose in the political mechanism of the government. Parties are, no doubt, essential in promoting the fundamental aims of a democratic form of government, in unifying, in harmonizing, and in directing the various departments. But the real service which the party system renders toward that end will continue to be thwarted unless the conspicuous evils and vital problems which have developed with the system are given that thought and effort on the part of citizens which will lessen or eradicate such evils.

The Convention System.—Evils and defects which developed under the convention system, and later in connection with the primaries, have tended to discredit party machinery and party organization. One of the chief defects of the convention system, it has been claimed, is that conventions are frequently in the hands of disreputable leaders.[2] This fact was evidenced in the roster of a Cook County convention which met in Chicago in 1896, in which, according to a current report, there were 157 delegates who had been convicted of crime, and 278 saloon keepers, pool-

[1] *Report on the status of the convention in your state. Secure information from officers of state committee, county committee, and precinct committee.*

[2] P. O. Ray, *Introduction to Political Parties and Practical Politics*, revised edition (Charles Scribner's Sons, 1917), p. 127.

room proprietors, etc., out of a total of 723 delegates.[1] It is hardly likely that such a body would select nominees representing the best citizenship of the community. Other defects which have developed under the convention system are the use of bribery and the intimidation of delegates before the meeting of the convention; the sending of substitutes as proxies, by which unscrupulous politicians often performed the duties of regularly elected delegates; the practice of organizing a faction among those defeated at the primaries in order to contest the election of the regularly chosen delegates; and the indulgence in fraudulent proceedings which frequently resulted in depriving the individual delegate of his judgment and vote. These and other evils of the convention system tended to discredit convention procedure and brought about a general demand for nomination by primaries. Government became a matter in which the few job seekers and ward politicians might exercise their activities and ingenuity; and to this type of citizen it gave its chief incentive and encouragement. To the orderly citizen there was a positive discouragement to participate in the sometimes outrageous procedure which conventions encouraged. All of these evils developed under a system in which the rules and regulations of conducting conventions were regulated by each party according to its own desires. The theory prevailed that political parties were private affairs in which the state had no interest, and parties were thus allowed to manage their own affairs in what has been called an extra-legal and extra-constitutional fashion. The customary method of procedure is thus described by M. Ostrogorski:

> The absolute power of the small cliques of managers, who settled everything behind the scenes, was such a common thing with them, that the old appellation of Caucus, in the sense of secret meeting, of cabal, was revived and applied in everyday language to the primaries, either term being used indifferently, and finally extended to the whole system of the

[1] P. O. Ray, *Introduction to Political Parties and Practical Politics*, revised edition (Charles Scribner's Sons, 1917), p. 128.

representative party organization, of which the primaries were the basis, under the name of "caucus system." The professional politicians, who filled the Organization at all its stages, executed their movements. under the direction of the managers and the wirepullers, with such uniformity and with such indifference or insensibility to right and wrong, and operated with such unerring certainty on the electorate, that they evoked the idea of a piece of mechanism working automatically and blindly,—of a machine. The effect appeared so precisely identical that the term "Machine" was bestowed on the Organization as a nickname, which it bears down to the present day, even in preference to that of "Caucus."[1]

The convention system was built upon a series of primaries entirely unregulated by law and controlled, as a rule, in the interests of the dominant machine. Some of the most notorious evils were practiced in such unregulated primaries.

Unregulated Primaries.—The evils which centered around the unregulated primaries were, briefly:[2] The predominance of the foreign elements, and as a result the increase of the large vote which has been continuously used by the party managers for their own special and private ends; and the holding of primaries in objectionable places, saloons, and other centers which the respectable citizens have found objectionable in case they performed their duties as voters. A few years ago the majority of primaries were held in saloons, under conditions which were far from conducive to good citizenship. Often rough and outrageous conduct prevailed at the primaries, and it has been a favorite practice to conduct the whole affair in such a manner in order to discourage the participation of those who did not sanction such procedure. Bribery has been

[1] M. Ostrogorski, *Democracy and the Organization of Political Parties;* vol. ii (The Macmillan Company, 1908), pp. 128–129.

Report on Tammany Hall. Cf. James Bryce, *The American Commonwealth,* ch. lxxxviii, and references in Ray, *op. cit.*, pp. 474–481.

Report on the Philadelphia and Pennsylvania Machine. Cf. Bryce, *op. cit.* lxxxix, and C. A. Beard, *Readings on American Government and Politics,* p. 127, and references in Ray *op. cit.*, pp. 474–481.

Report on the Colorado Machine. Cf. Ben B. Lindsey and Harvey J. Higgins, *The Beast* (Doubleday, Page & Co., 1910).

[2] For this summary we are indebted to P. O. Ray, *op. cit.*, pp. 115 ff.

used notoriously in elections when necessary to carry out the wishes of the boss or the machine, and party affairs have often been conducted by a very small group or ring made up of those who were seekers for office or were in the pay of some special or private interests and were seeking to control the government for these ends. Although laws have been enacted to prevent practically all of these evils, nevertheless recent revelations have made it clear that such methods and devices have by no means been eliminated.

The Regulated Primary.—As a result of a growing dissatisfaction with the convention system, dominated by party bosses and run by party committees, there developed a popular attempt to ascertain more nearly the popular will through the direct primary. In most states it is now used in some form in the nomination of state and local officers. But even under the direct-primary system many states have retained some form of the party convention as an organized agency to formulate the party platform and to assist in the administration of certain phases of the election laws. Moreover, in some states where conventions have given way to the direct primary, they have been re-established in order to permit the selection of candidates for certain offices.

The first primary law, passed by California in 1866, was purely optional, and in case it was accepted by a party required that (1) due notice be given of the time and place of the elections of candidates and delegates; (2) publication in the papers of the time and place of the primary be required; (3) provision be made for a supervisor to examine prospective voters. In addition penalties were provided for violation of the act. In Crawford County, Pennsylvania, a system was devised by which nominations were made by all parties on the same day under the same rules and regulations. This system was later recognized and approved under laws enacted by other states, in the effort to institute a statewide regulation

of primaries. Public attention was then directed to the evils of parties and their regulation by law. Beginning with 1880, laws were passed in rapid succession. These statutes were designed mainly to prohibit fraud, such as double voting, folding tickets, stuffing ballot boxes, impersonating a voter, bribery, and intimidation. The beginning of effective regulation of primaries came with the New York act of 1882, which was made applicable to a few counties and which was followed by similar acts in other states. About this time statutes began to prescribe the conditions of membership in a political organization and to institute party tests for participation in primaries. The state was slow to assume the expenses of the primaries, charges being supposed to devolve upon the parties. Eventually, however, the expense of the primary was made a public charge. Qualifications of primary voters were no longer left to the party itself. It was required that qualifications should be stated to the public in advance and that only qualified voters should participate in the voting. A form of oath was prescribed and a test required for the voters.[1]

About the same time a beginning was made in the regulation of conventions. The acts regulating conventions began to provide (1) the fixing of the date of the convention, (2) the call of the convention and convention procedure, and (3) party committees, particularly organization, terms, and elections.

The principle of the primary has also been applied to the selection of delegates to the national conventions at which presidential nominees are selected. To the Chicago convention in 1920, 569 delegates were selected through state presidential primaries, and to the San Francisco convention 638 delegates were thus chosen.[2] After a careful study of the methods employed by the states in the conduct

[1] C. E. Merriam, *Primary Elections* (University of Chicago Press, 1909), pp. 9 ff.

[2] Ralph S. Boots, "The Presidential Primary," *Supplement to the National Municipal Review*, vol. ix, no. 9 (September, 1920).

of the presidential primaries Mr. Ralph S. Boots summarizes the defects of the present system, chief among which are: large expenditures required of candidates who desire to conduct a campaign in all the states, and the failure of so many voters to participate that the result loses significance. To remedy some of the present difficulties it is suggested that primaries in all states be held on a uniform day, that registration be required on a similar basis in all states and that a limitation be placed on the expenditure of money to secure the nomination. Concluding his observations on the presidential primary, Mr. Boots remarks: "It is one of the first essentials of the success of popular government that the people believe it is popular and have confidence in its representative character and responsiveness. There is not lacking evidence that this condition does not obtain to a satisfactory extent respecting the election of the Chief Magistrate of the United States."[1]

The rapid spread of the direct primary is evidenced by the fact that there are only a few states that do not have a direct primary. And at the same time that the direct primary has been accepted as the method of nomination for almost all offices, a widespread agitation has developed for the repeal of the primary laws in order to return to the convention system.

The chief criticisms brought against the direct primary are, first, that the system fails to bring out a full vote. Although it was claimed for the direct primary that it would result in the more general participation of the voters in the making of nominations, it is rather unusual for 50 per cent or more of the qualified voters to take part in primary elections. In answer to this objection, it is contended that many more participate in making nominations than was the practice when former caucus methods and conventions prevailed. The second criticism against the primary is that the financial burden imposed on candi-

[1] Ralph S. Boots, "The Presidential Primary," *Supplement to the National Municipal Review*, vol. ix, no. 9 (September, 1920), p. 616.

dates is greater under the direct primary than under the convention system. It is the general belief that men of ordinary means have little chance to be nominated for public office. Though it is conceded that securing nominations under the direct primary costs more than was the case under the convention system, it is thought by many that this additional expenditure is justifiable. The enactment of laws limiting the amounts which candidates may spend has brought some improvement and the publication of publicity pamphlets giving some information concerning each candidate has reduced somewhat the necessity for extensive campaigning. But with all the devices to reduce costs the direct primary is an expensive system of making nominations. A third criticism brought against the direct primary is that it has not, as was predicted, improved to any appreciable extent the character and ability of the nominees for office. It is difficult to secure any intelligible and satisfactory basis for comparison, with the result that judgments are apt to be based on personal predilections. There are those who feel confident that the character and ability of candidates have declined, but others maintain that a gradual improvement is noticeable in the general character and qualifications of those who become candidates for public offices. "On the whole, however, the balance between the old and new systems so far as the character of nominees is concerned appears to be about even."[1]

A fourth criticism of the direct primary is that it has not eliminated the caucus and the tendency of an inner circle to prepare the slates and thus to determine in a large measure the names which shall go on the ballot as party nominees. Instead of the elimination of former party methods and practices most of them continue and are merely conducted along somewhat different channels. It was, perhaps, an illusion to expect that caucuses and

[1] A. C. Millspaugh, "Operation of the Direct Primary in Michigan," *American Political Science Review*, vol. x (November, 1916), p. 720.

inner circles would cease to operate when the direct primary was inaugurated. At any rate party organizations have adapted themselves quite readily to the new machinery and with slight variations go on doing business in their customary way.

Though criticisms have been directed from many quarters against the present primary system and though a few states have undertaken to return to a modified convention system, nevertheless the prevailing view appears to be that most of the serious defects of present primary laws can be eliminated, and that with some very necessary changes the direct primary may be retained as a useful and effective method of securing the popular choice of nominees for public office. A return to the convention system, though probably desired by many politicians, is not likely to take place if the primary system can be improved. Experience with the direct primary, however, has brought disillusionment; the system is not popular, it has revealed serious shortcomings, and there is at present no public demand for its further extension.[1]

Among those who favor a reform of the primary system there are very divergent views, but of these three distinct groups appear most prominent. First, there are those who would abolish the primary and return to the former convention system, with, of course, rather strict regulation of party procedure. This group forms a considerable minority in all of the states having the direct primary, and in several states it has gained control to such an extent that primary laws have been repealed. A second group, following the leadership of C. E. Hughes, former Governor of New York, would retain the primary system but would modify present laws so that representatives of

[1] A. C. Millspaugh, *op. cit.*, pp. 725–26. For information with regard to the working of direct primaries the following treatises are recommended: F. E. Horack, "Primary Elections in Iowa," *Iowa Applied History Series*, vol. i, pp. 263–300, 1912; N. H. Debel, "The Direct Primary in Nebraska," Nebraska Legislature Reference Bureau, Bulletin No. 7, 1914; Ralph S. Boots, "The Direct Primary in New Jersey," Bureau of State Research of the New Jersey State Chamber of Commerce, 1917.

each party chosen by voters of the party in local districts would meet to select candidates and formulate the platform for the party. In order to prevent machine control, should this evil develop, it is recommended under the Hughes plan that independent candidates be permitted to run for office and to permit voters to express freely their choice for such candidates, if so desired. This plan has been worked out in detail by a committee of the National Municipal League and is receiving favorable consideration, particularly in the Eastern States.[1] A third group would retain the present primary nominating system and by strengthening and improving existing laws would try to eliminate the serious defects of the present system. The advocates of this plan appear to be in the majority, particularly in the states of the middle and far West. What results will come from these and other conflicting views as to primary elections it would be rash indeed to predict. It is obvious that here is one of the problems of modern government which calls for the best thought of those who still have faith in the principles of popular government. A satisfactory method of recording the popular verdict and of securing persons of high caliber as to both ability and character in the filling of public office, is one of the greatest problems of democratic government.[2]

Party Funds.—To keep the extensive and elaborate party machinery going, a large amount of money is necessary. For this purpose, funds are collected by all of the parties. The sources of party funds are voluntary subscriptions, usually contributions made by the members of the party, contributions from corporations where the laws do not prohibit such contributions, various assessments made upon officeholders and aspirants to office and upon special

[1] *Cf.* "Proposals for a direct primary law designed to democratize party control and party nominations for state offices and at the same time preserve party leadership and party responsibility," prepared by Dr. Ralph S. Boots, Columbia University, chairman of the committee.

[2] See P. O. Ray, *op. cit.*, pp. 148 ff, on advantages and disadvantages of the direct primary.

Prepare an analysis of your state primary law.

interests such as public-utility interests, public contractors, saloons, and various resorts which desire government protection. Where there is a strong and well-organized machine a huge sum is collected from such interests and is expended to strengthen the party and to extend its influence and power. The increasing amount collected and expended by the leading parties, and the discovery of scandals connected therewith, have led to the passage of laws which attempt to limit contributions and to remedy some of the evils exposed. Among the measures enacted for this purpose are the corrupt practices acts, which aim to prevent bribery, treating, and various other questionable methods of securing votes; those which restrict the sources of party revenue, such as preventing contributions by corporations or by banks; and those which limit the purposes for which money may be expended and require publicity of campaign contributions and expenditures. Acts of Congress now also require full publicity with respect to contributions and expenditures for elections of members of Congress and for presidential campaigns. Campaign committees are required to keep an account of all receipts and expenditures; and a sworn statement of all contributions received, with the names of contributors and the purposes for which the money has been spent, must be filed for public inspection.[1]

Despite laws and acts attempting to prohibit corrupt conduct in elections, recent exposures in Indiana, Illinois, Texas, Michigan, and other states show that corrupt practices are by no means eradicated. The expenditure of large sums of money not accounted for in the statement of campaign expenses and efforts to change the results of elections by wholesale buying of votes have been exposed. Many of the provisions of bribery legislation are openly violated, and there are so many possibilities of evading

[1] See Ray, *op. cit.*, pp. 282–291, for description of remedial legislation. On legitimate and illegitimate use of money in elections, *Cf. ibid.*, pp. 277 ff.

laws that the placing of the electoral process on a basis of openhanded fairness and honesty remains as yet in large measure to be accomplished. Fortunately, the instances of general corruption are growing more rare, and even the sinister methods which were once quite general are now used less frequently.

The Control of the Political Boss and the Party Machine.— Probably no greater problem exists for the American people to handle than to lessen the influence of the boss and his associates in party politics. Unlike able political leaders and statesmen, the boss, as his name indicates, handles huge numbers of persons and their votes to his own liking. Playing upon the weaknesses and oftentimes the misfortunes of men, he manipulates the votes and rewards his supporters with the spoils of elections and favors which lie within his power to grant. To have political issues put honestly and openly before the citizens without the intrigues, favors, and influence of the party boss and machine being paramount is probably too high an ideal to approximate, with human nature constituted as it is. But if government is to approach democratic standards, the power of the person or persons who work in the dark instead of in the open, who use intrigue instead of fair and sincere argument, whose interests are primarily a matter of seeking selfish ends or power rather than a matter of general benefit, will have effectually to be checked. The excrescences of the party system of government, namely, the boss and the political machine, will have to be held within bounds if leadership within party organization and public office are to appeal to the type of persons who are best qualified through their ability as statesmen. The power which has come to the boss and the machine has resulted, to no small extent, from the various desires of corporations willing to grant substantial aid to

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Prepare an analysis of the laws of your state on campaign contributions and corrupt practices.

Report on corrupt practices in recent local elections.

party funds in return for special privileges and from the general indifference of the average voter and citizen to governmental affairs. In addition, the great number of elective offices, together with the general application of the spoils system with its attendant evils, have proved effective tools in the hands of corrupt politicians and unscrupulous bosses. The placing of party interests and successes above the importance of the issues at stake and the persistent loyalty to the candidates of a particular party, regardless of ability or policy, have also aided in giving the boss superior power in manipulating large numbers of voters.

The party organization, with groups of machines and local representatives in every community, controls the nominations to public office and forces presidents, governors, and other high officials to bow to its authority. An illustration of the extent of the extra-legal control exercised by a boss is aptly described in the testimony of Richard Croker, the boss of New York City, before a committee of investigation in 1899.

Q. You say these gentlemen[1] whom I have mentioned are your friends, do you? *A.* Yes, sir.

Q. You are their leader and have discussed together the political matters of the city, have you not? *A.* Yes, sir.

Q. You give certain directions and advice? *A.* Yes, sir.

Q. And they follow it? *A.* Some do.

Q. And when they do not? *A.* Some do and some don't.

Q. That is the only way a political party can be made practically successful, is it not? *A.* That is the way.

Q. It does not do to have divided councils at the head, does it? *A.* No, not very well.

Q. For that reason, when the party is dominant the men who are put into the city offices to administer the affairs of the city ought to be in such relation with the head that they will do what is generally considered by the organization to be the proper thing? *A.* We agree to that. We believe it is right, yes.

Q. The leader of that organization is always looked to for his advice,

[1] Men prominent in Tammany Democracy.

his judgment, and his direction, is he not? *A*. Not always. Often things are done that the leader don't know anything about.

Q. But there are so many things that you cannot be expected to know and understand them all. I agree on that. *A*. There are lots of things done that I am not accountable for at all.

Q. I want to read the names of the sachems.[1] We are not only talking, but we have got to make a record that is to go to the Legislature and I want it straight. ————————. Is that list substantially correct? *A*. Yes, sir.

Q. And all or nearly all of those men hold prominent positions now in the city government? *A*. Yes, sir.

Q. Is it not a fact that upon the success of the Tammany ticket in the election of the fall of 1897 there was a gathering at Lakewood of the important members of the Tammany organization, including yourself, at which was discussed the offices that were to be filled and the candidates for these offices? Is not that so? *A*. Oh, yes.

Q. And at that conference at Lakewood practically all of the important officers of the city and county government were selected, were they not? *A*. Well, pretty much.

Q. And your advice was asked upon them all, was it not? *A*. Mostly all, yes, sir.

Q. Do you recall any member of any important office of the city government now who was not discussed with you and your advice asked about him? *A*. No, I do not.

Q. These men were all agreeable to you, were they not? *A*. Yes, sir.

Q. And most of them were your personal selection, were they not? *A*. Well, no, they were not; not my personal selection at all.

Q. But the selection of yourself or of your immediate associates? *A*. Yes, sir.

Q. And they were selected partly because of their presumed ability to fill the offices and partly because of the loyalty they had to the organization which had triumphed? *A*. Yes, sir.

Q. And in filling those offices you looked directly to the practical questions of sustaining the strength of the successful organization, did you not? *A*. Yes, sir.[2]

The doctrine that to the victor belong the spoils when put into practice by political leaders and bosses led to the use of the public offices as an incentive for party work and as

[1] Officers in Tammany Hall.

[2] Investigation of the Offices and Departments of the City of New York, 1899, vol. i, pp. 326 ff, and vol. iii, pp. 2963 ff. Reprinted in C. A. Beard, *Readings in American Government and Politics*, revised edition (The Macmillan Company, 1913), pp. 568–570.

a source of party funds. Nominations were often publicly sold by a system of assessments, which varied in accordance with the importance of the office. A great amount of work had to be done, and the "ward heeler," as he came to be known, who was ready to do the bidding of his superiors and who sought some office or government favor, did the detail work which kept the party leaders in touch with the rank and file of the party. When certain individuals and organizations desiring special favors and protection, such as the saloons, the public utilities, and those doing government work or seeking government contracts, united their efforts to secure public officials which would favor these interests, a basis was formed for a local machine which in many instances secured and maintained control of city governments for periods which were interrupted by only intermittent waves of reform. There was thus fostered a species of politician whose chief preparation for public service was acquired in managing poll lists and running the election machinery, and who depended upon the periodical turn in political fortunes to take care of them and their friends. And it was only a matter of time when the clean sweep of public offices as a result of the defeat of the party in power would bring its reward to the faithful workers.

Reforms have been attempted and a few changes have been accomplished which have tended to lessen the amenability of governmental machinery to the underhand workings of the boss and the machine. Other changes, with the ultimate aim to lessen some of the existing evils of the party system and to enhance the opportunities to express better the real will of the people, are in the process of being realized.

An effort has been made by a number of states to remove some of the evils which characterized early party methods, such as an identification of voters, bribery, intimidation, treating, repeating, and ballot box stuffing. In the first place, states have enacted laws forbidding corporations

from making contributions to campaign funds and thus influencing parties in their behalf. Provision is also made for the prohibition of some of the questionable expenditures for campaign purposes. The amount of money to be spent by a candidate for his friends is now regulated in a large number of states. It is customary to require sworn, itemized statements of expenditures incurred for elections, and in some cases the maximum amount is prescribed. More recently the states have begun to provide contributions to the campaign fund in order that the burden of the campaign may be lightened for those of small financial means. Furthermore, the expenditures of party committees are limited by statute. "More and more public sentiment demands that elections shall be free from the taint of corruption to the end that the results shall represent the real choice of the people and thus popular government be made to be what its founders intended it should be."

In addition to numerous corrective and restrictive measures the states have attempted to regulate party organizations and election methods through the control of the ballot.

Ballot Legislation

In the early history of parties, voting was by *viva voce* and was held in the open. The *viva-voce* system was gradually superseded by the unofficial ballot. By the middle of the nineteenth century the ballot had come into quite general use. No provision was made by law for the printing and distribution of the ballots, and the party organization took entire charge of the matter. Tickets were either given to the voter in advance of the election or they might be obtained at the polling place. The ballot system as in use from 1840 to 1875 was open to serious abuses. Among the chief defects of this unofficial ballot were the fact that it was not secret and that as a result bribery, intimidation, and fraud were used to such an

extent as to render the conduct of elections scandalous, and the fact that the entire control of the preparation and the distribution of the ballots was left to irresponsible party committees. Finally, violence and confusion were the usual accompaniment of elections.

> Sham battles were frequently engaged in to keep away elderly and timid voters of the opposition. Many electors had their coats torn from their backs, ballots snatched from their hands, and others put in their place, with threats against using any ballot except the one substituted.[1]

To remedy such defects the Australian ballot system was introduced.

The Australian Ballot.—The Australian ballot was first tried out in Australia and in England, and was introduced into the city of Louisville, Kentucky, and soon afterward into Massachusetts. After its introduction in the United States, it was rapidly accepted by the states as a probable remedy for the numerous evils which had crept into election practices and procedure. After 1890 there came a very rapid adoption of the Australian ballot and the beginning of the definite legal regulation of parties. The names of the candidates, under this plan, are placed on a single ballot which is printed and distributed at public expense. The state advertises the names of the candidates, and the ballot can be marked only in the voting places provided for this purpose. The entire object of the system is to secure absolute secrecy in voting.

The essential features of the Australian ballot are: (1) All ballots are printed under the supervision of public officials, at public expense, and are transmitted by these officials to the various voting places. (2) The names of all candidates nominated by any recognized political party are printed on a single sheet with an official designation. (3) A voter can secure a ballot only from the regular election officials at the polling place on election day and after having

[1] Evans, Eldon C., *A History of the Australian Ballot System in the United States*, p. 16.

complied with preliminary requirements as to registration. (4) Ballots must be marked in secrecy within the voting booth, with the proviso, under many laws, whereby a voter who claims he is unable to mark the ballot may receive assistance.

The Australian ballot soon underwent modifications which materially affected the general results anticipated by the ballot reformers. Reasons for these changes are thus described by Mr. Allen:

> The fact that most American voters were accustomed to voting a whole party ticket at a single operation explains how the true Australian ballot came to be modified in this country. The ballot reformers proposed a method by which a thick-and-thin Republican should, on election day, vote first for a Republican Governor, then for a Republican Lieutenant-Governor, then for a Republican secretary of state, and so on, until he finished his ballot by voting for a Republican pound master. It was very plausible for the politicians in communities accustomed to the "vest-pocket ballot" to say: "No, we like your plans for a secret vote. We like your plans for purifying the polls and for insuring a fair count. But we do not like your idea of scattering the nominees of a party all over a blanket sheet. We will adopt your safeguards and we will make the ballot official, but we will follow the form of our old familiar party slip, simply arranging them side by side on a blanket sheet like yours."[1]

In order, then, to encourage straight-ticket voting and to strengthen party organization, the Australian ballot was seriously transformed, particularly in the party-column ballot, with a party scroll and emblem at the top by which it was rendered possible to vote a straight ticket by means of a single mark with much more ease than to vote a split ticket. It then became the chief practice of the party to encourage straight-ticket voting on the part of the uneducated voters and thereby to strengthen party control. This encouraged what has been described as the system in which each party placed in a "pigeonhole" those who usually voted the straight ticket and then concentrated its effort

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[1] "The Multifarious Australian Ballot," *North American Review*, vol. cxci (May, 1910), p. 585; reprinted in P. S. Reinsch, *Readings on American State Government* (Ginn & Co., 1911), pp. 364–365.

upon the group who were disposed to vote a split ticket and who constituted the independent element of the electorate.

The two chief forms of the Australian ballot in use in the United States are the office ballot, in which the candidates are arranged under the office usually in alphabetical order, and the party-column ballot, in which the candidates are arranged according to party rather than office.[1]

The Australian ballot system, owing to the long list of officers to be elected and the frequent elections, brought about the development of the long ballot, with all of the consequent evils which have recently been made public. The majority of men elected to office were frequently unknown to the voters, were placed on the ballot by the party managers, and were usually carried into office by the head of the ticket.

A great deal of evidence as to the evils of the long ballot and the system of electing officers under this plan has been presented, and an effort has been made within recent years to reduce the number of elective officers and to do away with some of the consequent evils.

Certain results of the use of the long ballot have brought discredit to this method of securing popular control. There is convincing testimony to the fact that the average voter does not know the majority of the candidates for whom he votes, and that blind voting becomes the practice in the selection of all but a few of the important candidates on the ticket.[2] But more significant still is the fact that the many nominations to be made and the offices to be filled constitute a task which the voter cannot perform, and the result is that the job is undertaken by the politicians who have made of the party in the United States veritably "an office-filling and spoils-sharing device."

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[1] On the practice with respect to obtaining and distributing the ballots and rendering assistance to voters, see E. C. Evans, *op. cit.*, pp. 48–55.

[2] See testimony of President Wilson, C. A. Beard, *American Government and Politics*, third edition (The Macmillan Company, 1920), pp. 478–479; also article by R. S. Childs, *The Outlook*, vol. xcii (July 17, 1909), p. 635.

Representative, responsible, efficient government is our goal; and the way to it lies not through additional and more complicated political machinery, but through such a simplification of our present machinery as will permit the electorate to bring steady and persistent pressure on the great organs of government in the broad daylight of interested public discussion.[1]

President Wilson put the situation relative to the long ballot in these terse phrases:

Elaborate your government; place every officer upon his own dear little statute; make it necessary for him to be voted for; and you will not have a democratic government. Just so certainly as you segregate all these little offices and put every man upon his own statutory pedestal and have a miscellaneous organ of government, too miscellaneous for a busy people either to put together or to watch, public aversion will have no effect on it; and public opinion, finding itself ineffectual, will get discouraged, as it does in this country by finding its assaults like assaults against battlements of air, where they find no one to resist them, where they capture no positions, where they accomplish nothing. You have a grand housecleaning, you have a grand overturning, and the next morning you find the government going on just as it did before you did the overturning. What is the moral? . . . The remedy is contained in one word: *simplification.* Simplify your processes, and you will begin to control; complicate them, and you will get farther and farther away from their control. Simplification! simplification! simplification! is the task that awaits us; to reduce the number of persons to be voted for to the absolute workable minimum—knowing whom you have selected; knowing whom you have trusted; and having so few persons to watch that you can watch them.[2]

As a result of the long ballot and blind voting, large power is intrusted to organizations of political specialists. This condition, the leaders of the short-ballot movement contend, is not due to the peculiar civic indifference of the American people, but rests on the fact that our form of democracy is unworkable because—

First, it submits to popular election offices which are too unimportant to attract public attention.

Second, it submits to popular election so many offices

[1] C. A. Beard, *op. cit.*, p. 483.

[2] From "Civic Problems," an address delivered March 9, 1909, before the Civic League of St. Louis. Quoted in C. A. Beard, *op. cit.*, p. 483.

at one time as to make the business of ticket making too intricate for popular participation hence some sort of private political machine becomes an indispensable element in electoral action.

Consequently many are elected to public office without adequate public scrutiny, and owe their selection not to the voters, but to the makers of the party ticket, who thus acquire an influence that is capable of great abuse.[1]

The long ballot, with its various lists of trivial offices, is to be found nowhere but in the United States. The English ballot never covers more than three offices, usually only one. In Canada, the ballot is less commonly limited to a single office, but the number is never large. To any Englishman or Canadian, our long ballot is astonishing and our blind voting appalling. A Swiss would have to live four hundred years to vote upon as many men as an American undertakes to elect in one day. The politicians as a professional class, separate from popular leaders or office-holders, are unknown in other lands, and the very word "politician" has a special meaning in this country which foreigners do not attach to it. Government manipulated behind the scenes by politicians, in endless opposition to government by public opinion, is the "unique American phenomenon in the long ballot's train of consequences."[2]

The Short Ballot.—The short ballot plan is a non-partisan movement, the significance of which may be indicated by a few representative opinions.[3]

I have the fullest sympathy with every reform in governmental and election machinery which shall facilitate the expression of the popular will, such as the Short Ballot and the reduction in elective offices. —William H. Taft, speech of acceptance, 1912.

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[1] Taken from *The Short Ballot—A Movement to Simplify Politics* (1920). The National Short Ballot Organization, New York City.

[2] *Short Ballot Principles*, by R. S. Childs, (Houghton, Mifflin Company, 1914).

[3] Reprinted in Foreword to *The Short Ballot in Illinois*, published by the City Club of Chicago in 1912 and in *The Short Ballot; A Movement to Simplify Politics*, 1920 issued by the Short Ballot Organization.

In the first place I believe in the short ballot. You cannot get good service from the public servant if you cannot see him, and there is no more effective way of hiding him than by mixing him up with a multitude of others so that there are none of them important enough to catch the eye of the average workaday citizen.—THEODORE ROOSEVELT before Ohio Constitutional Convention.

I believe the short ballot is the key to the whole problem of the restoration of popular government in this country.—WOODROW WILSON.

There should be a reduction in the number of elective offices. The ends of democracy will be better attained to the extent that the attention of the voters may be focused upon comparatively few offices, the incumbents of which can be held strictly accountable for administration. —CHARLES E. HUGHES.

The short ballot—as if that were not absolutely the gist of all constructive reform. The short ballot—few candidates to be voted for; so few that the voters can really inform themselves about the merits and demerits of the candidates—now there is the only way to get rid of the bosses and the machines.—CHARLES W. ELIOT.

The term "short ballot" has come into use during the last ten years in connection with the movement to reduce the number of elective offices. It contemplates the election of those officers only who are to determine policies and the appointment of those who are to act in a purely administrative capacity.

It is a device intended to do away with our blanket ballot and to concentrate the attention of the voter upon a few important positions on which he can make a relatively intelligent decision as to candidates. A prominent advocate of the short ballot sums up the faults to be remedied by the short ballot. We find, he says, that there are three practical methods of concealing public servants from their masters, the people, and thus causing popular control to relax:

(a) By having so many elections simultaneously that each individual candidate is lost in the confusion.

(b) By dividing power among so many petty officers that each one of them escapes scrutiny by reason of insignificance.

(c) By making an office undebatable in character, so that discussion regarding it is dull and unlikely to attract attention.[1]

[1] R. S. Childs, *Short Ballot Principles*, p. 50.

To remedy such conditions as now prevail, which result in blind voting and unintelligent action by voters, the following are regarded indispensable:

1. To shorten the ballot to a point where the average man will vote intelligently without giving more attention to politics than he does at present.
2. To limit the elective offices to those which are naturally conspicuous.

Short-ballot principles as applied to a state would, it is thought, result in the election of but few state officers, such as the Governor and one or more financial officers, and the appointment of the heads of the state executive departments, boards, bureaus, and commissions. The members of Congress and of the state legislatures would also be elected, but by a district system each voter would be called upon to make but one choice. In counties, the members of the county board, and in cities the members of the city council, are, it is believed, the only positions which should be filled by popular election.[1]

The short-ballot plan involves the extension of the appointive power for the higher positions and the adoption of the merit system for the selection of all but a few of the executive officers, who may be regarded, with the Governor, as responsible for the general policies of the administration.

There are no "short-ballot" states, though several have taken important steps in the direction of shortening their ballots. In California, the members of the railroad commission, the state printer, and the clerk of the supreme court have been removed from the ballot, and Ohio has taken from the elective list the public works commissioner, the superintendent of public instruction, and the dairy and food commissioner. "The nearest approach to a 'short ballot' state is now New Jersey, where but a single executive officer is elected."[2] A long step forward was

[1] *Cf. The Short Ballot in Illinois*, report of the Short Ballot Committee of the City Club of Chicago and *The Short Ballot Applied to the State of New York*, reprinted by the National Short Ballot Organization.

[2] *Bulletins for the Massachusetts Constitutional Convention, 1917–18*, vol. i, no. 10, p. 397.

taken in the enactment of the Civil Administrative Code of Illinois, which is planned on the short-ballot basis, making the Governor the executive head of the state, with the right to appoint Cabinet heads. It is anticipated that the constitutional convention soon to convene will make Illinois a real short-ballot state.[1]

A recent amendment has shortened the ballot of Pennsylvania. Hereafter, each elector will mark his ballot only for Governor, Lieutenant-Governor, and two other state officers; for a representative in Congress, a state senator, and a representative in the general assembly from his own district. If administrative consolidation as outlined in the many state commissions and committees is adopted, the present ballots will be materially shortened. The short ballot movement has gained greatest headway in the cities where commission government has reduced the number of elective officers to a board of approximately three to seven members, who become responsible for the entire management of city affairs. In the Federal government the short ballot now prevails, for the voter selects a President who becomes responsible for the Cabinet and through his advisers for all of the subordinate officers in the Federal administrative service. It remains for the states to change their administrative organization so that the generally accepted principles of the short ballot may be incorporated.

Among the recent efforts to improve political methods is the introduction of the nonpartisan ballot on which all party designations have been eliminated and the candidates arranged alphabetically in groups under each office. Nonpartisan ballots have been adopted particularly in cities with commission government and in the election of judges. In a few cases the nonpartisan feature has been applied to the nominations and elections for state officers. Though the removal of party designations makes it more difficult

[1] For proposed amendments and legislative acts to introduce the short ballot in a state cf. "The Short Ballot Applied to the State of New York," issued by the National Short Ballot Organization.

for the ignorant voter to receive instructions, it has of course not had any noticeable effect upon the control and dominance of the election machinery by parties.

Even though the ballot is considerably shortened and other defects are, in part, eradicated, other difficulties stand in the way of a direct and accurate recording of the popular will by means of the ballot. One of these difficulties is involved in the problem of election by a plurality or by a majority system. To solve this problem the preferential ballot has been introduced.

The Preferential Ballot.—Election by plurality vote is the rule in elections in the United States. In principle, election by a majority vote is thought desirable, although an objection to this method is that where there are more than two candidates a failure to secure a majority is always a possibility. On the other hand, election by plurality, when there are more than two candidates for an office, is likely to result in a selection representing a minority of the voters. The preferential ballot is a device by which the will of the majority of the voters may be ascertained with more certainty and carried into effect. This result is accomplished by permitting the voter to indicate his first choice and his second choice, and at times additional choices, among the candidates for office. Preferential voting is in use in Queensland and in Western Australia; in numerous American cities, including Cleveland, Denver, Spokane, and Grand Junction; and in primary elections in the states of Maryland, Washington, Oregon, Indiana, Idaho, Wisconsin, Minnesota, and North Dakota.

The three methods of preferential voting most commonly used are known as the Ware system, the Bucklin system, and the Nanson system, respectively. A brief description of each follows:[1]

The Ware System.—W. R. Ware devised a system by

[1] This description follows the summary presented in an article on Effective Voting by C. G. Hoag, Secretary of the Proportional Representation League. See also the *Bulletins for the Massachusetts Constitutional Convention, 1917–18*, vol. ii, no. 27, p. 303.

which the voter may express his preferences among the candidates—as many or as few as he pleases—by putting the figure 1 opposite the name of his first choice, the figure 2 opposite the name of his second choice, and so on. The first count is only of the first-choice votes. If no candidate has a majority, the lowest candidate is excluded and his votes only are considered again and added to the votes of the other candidates as the preferences indicate. The candidates are thus successively excluded until only two remain, of whom the higher will have a majority vote and will be elected.

This system is called in Great Britain the "alternative vote," and in Queensland, the "preferential vote." It is regarded as preferable to the "second ballot," used in Austria-Hungary, France, Germany, Italy, Norway, and other European countries. It does at a single election more than the second-ballot system does in two, and does it better. It is not, however, a perfect majority system; for, like the second-ballot system on which it is so obviously an improvement, and like our own double election system, on which it is a still greater improvement, it may drop out at some stage of the whole process of election a candidate who is really preferred by a clear majority to any other candidate in the field taken singly.

The preferential voting system used in the primary elections of Wisconsin, Minnesota, and some other states is the Remsen system, which is a modification of the Ware system (1) by the restriction of the voter to the expression of but two preferences to any office, (2) by provision of a first choice and a second choice column, instead of the numerals 1 and 2, for the indication of preferences, and (3) by the adaptation of the rules for counting the votes to the provision that a voter may express only two preferences. These changes have been made to render it possible to complete the count without bringing all the ballots or a full record of such together from the voting precincts, as is required under the Ware system.

The Bucklin System.—The majority preferential system used in the cities of Grand Junction, Denver, Spokane, Portland, Cleveland, and in the state of North Dakota, was first proposed by Condorcet in 1793. But it was not until 1909 that it came into prominence, when it was adopted by Grand Junction, Colorado, under the leadership of Hon. James W. Bucklin of that city.

The Bucklin system, except for certain unessential features, differs from the Ware system only in the rules of the count. The Ware rules prescribe, if there is no majority of first choices, the dropping out of the candidate lowest on the poll and the distribution of his ballots only according to the second or the next highest available preference marked on them, then the dropping of the next lowest candidate in the same way, and so on until one candidate has a majority of the votes. The Bucklin rules, on the other hand, prescribe, if there is no majority of first choices, the adding together of the first-choice and the second-choice votes for each candidate to see whether any candidate has a majority, counting both; next, if no candidate has such a majority, it prescribes the adding together of the first-choice, second-choice, and third-choice votes for each candidate to see whether any candidate has a majority, counting the three grades of votes together; and so on until some candidate has a majority, counting all the grades of votes thus far taken into account, when that candidate is declared elected.

The Nanson System.—A majority preferential system devised by E. J. Nanson, of the University of Melbourne, Australia, and known as the Nanson system, differs from the Ware and the Bucklin plans only in the rules of the count. The first choice is given more credit than a second throughout the entire count, a second more than a third, and so forth. Then, in accordance with simple rules formulated by Professor Nanson on the basis of a mathematical solution of the problem, those candidates whose total credits show them to be unquestionably in-

ferior to other candidates in the opinion of the voters as indicated on the ballot are successively dropped out as defeated, until the candidate preferred to any other is left and declared elected. Following are the complete rules for this system:

1. At the voting precincts, transcribe on co-ordinate paper (ruled to correspond with the spacing of the names of the candidates on the ballot) the figures marked on the ballots by the voters, using a separate column for each ballot and numbering both ballot and column with a distinctive number in order to be able at any time to compare the original ballot with its record. Send the record to the central electoral board, as ordered by that board.

2. On the record, but not on the ballots, let the central electoral board fill in all blank spaces with the figure found by dividing by two the sum of the number of candidates and a number one higher than that indicating the last preference marked on the ballot by the voter.

3. Add the figures of each candidate.

4. Exclude as defeated every candidate whose total is equal to or more than the average.

5. If more than two candidates remain, set down on record sheets figures representing the preferences on all the ballots as among the candidates remaining. Add again, and again eliminate all candidates whose total is equal to or more than the average.

6. Proceed again, if necessary, as prescribed in rule 5, until only two candidates remain. When only two remain, examine the record to see which of these two was preferred to the other by the voters, and declare him elected.

On account of the complicated nature of the Nanson rules, this system has not gained in favor. In the United States the preferential ballot has been adopted largely in cities.

Another method of securing election by majority rather than by plurality is by means of second choice nomination laws. Under these laws voters are expected to designate upon their ballots their first and second-choice of candidates presented. When the count is made the candidate with the least number of first places is dropped and the support of his followers is divided among the other candidates in accordance with their second choices. This process of

elimination is conducted until one candidate receives a majority of votes cast and so becomes the nominee of his party. Provisions for second-choice nomination are found in Ohio, Oregon, Minnesota, Alabama, Washington, North Dakota, and Iowa.

The system of preferential or majority elections, as well as election by plurality, when used with the ordinary method of counting the votes, is subject to results not wholly satisfactory. With preferential voting there is a chance that no candidate will be elected, while with plurality voting the person elected may represent the choice of only a minority of the voters. Through the preferential ballot it is possible to ascertain the opinion of the voter as to all the candidates, and while there are various systems of preferential voting, the chief differences lie in the methods of counting the votes. More than forty American cities, including San Francisco, Cleveland, and Denver, use the preferential system, and a number of states use it in the primary elections.

Compulsory Voting.[1]—Along with the growth of democratic ideals in modern government, together with the extension of suffrage to include all classes regardless of sex, has arisen the question of how to get responsible men and women to vote when once the right has been granted them. A few countries have put into effect, with varying results, compulsory voting. In such nations, voting is no longer considered a privilege or a right to be used or ignored at the pleasure of the individual, but as a matter of duty. If the will of the people is to be ascertained in countries professing to have popular government, it then behooves the citizens to express their will through the ballot.

Compulsory voting has been enforced in Belgium since 1893 with very successful results. According to the Belgian law, electors necessarily absent from the polls on

[1] For a summary of the provisions relative to compulsory voting consult *Bulletins for the Massachusetts Constitutional Convention, 1917–18*, vol. ii, no. 24, p. 227.

election day may notify the officials, stating the reasons. If these are satisfactory, the absentee is excused and no penalty attaches. For failure to vote without satisfactory excuse, there is a punishment graded according to the number of offenses. The fourth offense within fifteen years carries the penalty of removing the voter's name from the list and of rendering him ineligible for ten years for any civil office or emolument. An interesting feature of the Belgian law is that if a person changes his residence between the time the list of voters is made and the time of election, he must return to his former residence to vote, but in doing so he travels free on railroads owned by the government.

On the other hand, in Spain the results of compelling citizens to vote are not so markedly successful. Results vary with the different provinces: where negligence toward voting prevails, general ignorance and bossism also prevail; and where a higher state of intelligence and education is found, a greater interest in civic affairs and in elections is also manifested. The law as to compulsory voting provides for a number of exemptions, such as the aged and the infirm; public officials, as judges of first instance, certain public notaries, also candidates for Chamber of Deputies or city council. Other electors failing to vote are liable, first, to the publication of their names, and, secondly, to the payment of an additional tax of 2 per cent upon the taxes due the state from them. Electors who have neglected to vote are also disqualified from holding office until they have voted at an ensuing election. However, since the law is not uniformly enforced nor the fines regularly imposed, little has been accomplished in Spain through the enactment of the compulsory voting law. Switzerland and New Zealand have also made provisions penalizing electors who do not participate in elections. Elections are held in Switzerland on Sunday, and that fact, as well as a fairly successful enforcement of the compulsory voting law in about five of the cantons, tend to bring the number of

electors who vote up to a rather high average, in spite of the fact that the law carries with it numerous exemptions and the fines imposed are small. In New Zealand, electors who are not exempted by law and who do not do their duty in the exercise of the franchise have their names taken from the list of voters. Though Austria has given the legislative assemblies of the provinces the power to compel franchised citizens to vote and to punish those who do not vote by imposing a fine, only one province has adopted the system.

Until recently, practically nothing was attempted with respect to compulsory voting in the United States. However, a few states have lately adopted an amendment to, or have included some provision in, their fundamental law, which includes some means to compel electors to avail themselves of the privilege of voting. Oklahoma in 1916 made it the duty of every qualified elector to register as such, and provided that, if any qualified person failed to vote at three successive elections held in his precinct, such registration was to be canceled. The legislature of North Dakota has been given the power by the constitution to prescribe penalties for failure to vote on the part of those legally qualified to participate in elections, but so far the legislature has passed no act relative to compulsory voting. Illinois employs the rather unusual method of drawing her jurymen from the nonvoters lists. Probably the most significant measure taken with respect to compulsory voting is that of Massachusetts in the way of a constitutional amendment to the effect that: "The General Court shall have authority to provide for compulsory voting at elections, but the right of secret voting shall be preserved."

The practice of compelling legally qualified voters to perform their duty in expressing their opinions through the ballot promises to gain in favor. The fact that most contests in the United States are decided by a mere plurality of those voting shows that but few additional votes will change the result completely, and it is felt that by

enforcing compulsory voting the will of the people will be more nearly expressed. It is supposed, also, to lessen some of the existing evils now incident to party politics, such as corrupt methods of getting voters to the polls or in some cases of bribing them to stay away; then, too, it helps to impress the voter with the importance of his vote and tends to make him feel his responsibility in the government.

The Invisible Government

In spite of the many reforms that have been put into effect relative to primary elections and conventions, secrecy in balloting, and the extension of suffrage, there still remains the problem in popular government of securing effective regulation of parties. It is the problem of having statesmen become the political leaders instead of the political bosses who are now the power behind those who hold governmental positions and who constitute what has come to be known as "the invisible government."

Before the New York Constitutional Convention in 1915, Elihu Root, under the title "The Invisible Government," stated the problem of parties and government in the following stirring appeal:

> We talk about the government of the constitution. We have spent many days in discussing the powers of this and that and the other officer. What is the government of this state? What has it been during the forty years of my acquaintance with it? The government of the constitution? Oh, no; not half the time, or halfway. When I ask what do the people find wrong in our state government, my mind goes back to those periodic fits of public rage in which the people rouse up and tear down the political leader, first of one party and then of the other party. It goes on to the public feeling of resentment against the control of party organizations, of both parties and of all parties.
>
> Now, I treat this subject in my own mind not as a personal question to any man. I am talking about the system. From the days of Fenton and Conkling and Arthur and Cornell and Platt, from the days of David B. Hill, down to the present time the government of the state has presented two different lines of activity, one of the constitutional and statutory officers of the state, and the other of the party leaders—

they call them party bosses. They call the system—I don't coin the phrase, I adopt it because it carries its own meaning—the system they call "invisible government." For I don't remember how many years, Mr. Conkling was the supreme ruler in this state; the governor did not count, the legislatures did not count; comptrollers and secretaries of state and what not did not count. It was what Mr. Conkling said, and in a great outburst of public rage he was pulled down.

Then Mr. Platt ruled the state; for nigh upon twenty years he ruled it. It was not the governor; it was not the legislature; it was not any elected officers; it was Mr. Platt. And the Capitol was not here; it was at 49 Broadway; Mr. Platt and his lieutenants. It makes no difference what name you give, whether you call it Fenton or Conkling or Cornell or Arthur or Platt, or by the names of men now living. The ruler of the state during the greater part of the forty years of my acquaintance with the state government has not been any man authorized by the constitution or by the law; and, sir, there is throughout the length and breadth of this state a deep and sullen and long-continued resentment at being governed thus by men not of the people's choosing. The party leader is elected by no one, accountable to no one, bound by no oath of office, removable by no one. . . . But it is all wrong. It is all wrong that a government not authorized by the people should be continued superior to the government that is authorized by the people.

How is it accomplished? How is it done? Mr. Chairman, it is done by the use of patronage, and the patronage that my friends on the other side of this question have been arguing and pleading for in this convention is the power to continue that invisible government against that authorized by the people.

What does the boss have to do? He has to urge the appointment of a man whose appointment will consolidate his power and preserve the organization. The invisible government proceeds to build up and maintain its power by a reversal of the fundamental principle of good government, which is that men should be selected to perform the duties of the office; and to substitute the idea that men should be appointed to office for the preservation and enhancement of power of the political leader. The one, the true one, looks upon appointment to office with a view to the service that can be given to the public. The other, the false one, looks upon appointment to office with a view to what can be gotten out of it. . . . Mr. Chairman, we all know that the halls of this Capitol swarm with men during the session of the legislature on pay day. A great number, seldom here, rendering no service, are put on the payrolls as a matter of patronage, not of service, but of party patronage. Both parties are alike; all parties are alike. The system extends through all. Ah, Mr. Chairman, that system finds its opportunity in the division of powers, in a six-headed executive, in which, by the natural workings of

human nature there shall be opposition, discord, and the playing of one force against the other, and so, when we refuse to make one governor elected by the people the real chief executive, we make inevitable the setting up of a chief executive not selected by the people, not acting for the people's interest, but for the selfish interest of the few who control the party, whichever party it may be. Think for a moment of what this patronage system means. How many of you are there who would be willing to do to your private client, or customer, or any private trust, or to a friend or neighbor, what you see being done to the state of New York every year of your lives in the taking of money out of her treasury without service? We can, when we are in a private station, pass on without much attention to inveterate abuses. We can say to ourselves, I know it is wrong, I wish it could be set right; it cannot be set right, I will do nothing. But here, here, we face the duty, we cannot escape it, we are bound to do our work, face to face, in clear recognition of the truth, unpalatable, deplorable as it may be, and the truth is that what the unerring instinct of the democracy of our state has seen in this government is that a different standard of morality is applied to the conduct of affairs of state than that which is applied in private affairs. I have been told forty times since this Convention met that you cannot change it. We can try, can't we? I deny that we cannot change it. I repel that cynical assumption which is born of the lethargy that comes from poisoned air during all these years. I assert that this perversion of democracy, this robbing democracy of its virility, can be changed as truly as the system under which Walpole governed the commons of England by bribery, as truly as the atmosphere which made the *credit mobilier* scandal possible in the Congress of the United States has been blown away by the force of public opinion. We cannot change it in a moment, but we can do our share. We can take this one step toward, not robbing the people of their part in government, but toward robbing an irresponsible autocracy of its indefensible and unjust and undemocratic control of government, and restoring it to the people to be exercised by the men of their choice and their control.[1]

In these suggestive words, Senator Root brought to public attention one of the fundamental facts of the American government—namely, that there exist a government of the constitution and the laws and a government of political bosses and parties. The one is constitutional and

[1] *New York State Constitutional Convention Documents*, No. 50; reprinted in the *Annals of the American Academy of Political and Social Science*, vol. lxix, pp. x–xiii; *Cf.* also article by Edgar Dawson, "The Invisible Government and Administrative Efficiency," *ibid.*, pp. 11–21.

legal, the other extra-constitutional and largely beyond adequate control by law.

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CHAPTER III

THE MERIT SYSTEM AND PUBLIC CONTROL OF GOVERNMENT

Good Government and Efficient Public Servants[1]

One of the requirements for successful and efficient government is the selection of officials of good character and special qualifications for the public service. Whenever the offices are filled by men of high character and ability the government is likely to be conducted with a high degree of success. Such was the case when the Roman Senate in the days of the Republic was composed of men of unusual integrity and administrative ability. On the other hand, government is likely to be weak and inefficient when favoritism, influence, and corruption dominate political life. Such was the case with the monarchs of the old regime in France, who were thrust aside when the wave of revolution spread in 1789. Too little attention has been given to the ways and methods of recruiting the public service, and particularly is this true of the United States, where the doctrine "to the victor belong the spoils," along with the principle of the rotation in office, has dominated political practice. One of the most difficult problems for democratic government centers around the patronage and the spoils of office, which are an outgrowth of the American party system. It remains for American democracy to learn the lesson of efficient administration from European nations and to adapt such administration to the theories and principles of popular government.

[1] *Secure: Annual Proceedings of the National Civil Service Reform League, Annual Report of the United States Civil Service Commission (Washington, D. C.), Annual Reports of State and City Civil Service Commissions, especially of Massachusetts, Illinois, Wisconsin, New York, and Ohio.*

Public offices are filled by one of three methods—by appointment, by election, or by selection through a merit system involving some form of competition. Prior to the nineteenth century the method of appointment was commonly pursued. With the advent of popular control of government, elections were introduced to fill many offices. Difficulties in securing competent public servants either by appointment, which results frequently in rewarding favorites, relatives, or personal friends, or by the elective system, which often brings into office politicians rather than competent officials, led to the introduction of the merit system based on competition. During the latter part of the nineteenth century the merit system was greatly extended. It has been difficult to reconcile the principles of the merit system, involving service during a period of efficiency and good behavior, with some of the early theories of popular government and democracy. This reconciliation has been made, however, and the merit system has had a promising development in countries where popular government prevails.

In the development of democratic government, a distinction has been drawn between (a) political offices to be filled by election and (b) administrative offices to be filled chiefly by appointment on some basis of merit. In all government in which the people have any voice, there are policies to be decided and issues to be determined on which the popular will must be considered and in which the people should exercise control. Such matters as high or low taxes, good or bad roads, prohibition or saloons, are questions on which the popular verdict may well be expressed. For this purpose, certain offices are regarded as of a political nature, and these offices are usually the channel through which the public will and popular sentiment may prevail. On the other hand, there are in the management of government many details of administration which can be understood only by experience and for the performance of which certain qualifications and

training are necessary. For these administrative positions the most effective service can be secured only through the selection of appointees on a basis of merit and promotion as a result of proved ability, with the assurance of permanence of tenure. In the words of Chief Justice Ryan, "where you want skill you must appoint; where you want representation elect." While certain political offices ought always to be filled by election, and while the popular will should be made to prevail through these public offices, the most difficult part of the problem is the method of recruiting the civil service in the large number of administrative positions in which political opinions ought to have little weight. The development of methods of recruiting the civil service in the United States will be briefly reviewed, and the present civil service system will then be compared with those of England and France.

Civil Service and the Spoils System in the United States

Early Administrations.—The beginning of civil service in the United States under the administration of Washington followed certain principles which characterized the method of appointment under all of the first presidents. The chief thought of Washington was the fitness of the appointee to fill the desired position. Among the qualities of fitness Washington considered, first, the ability to perform the functions of the office; second, previous experience, preferably in some official capacity; third, established reputation. In the beginning little attention was paid to political opinions or party politics, but as the strife between the Federalists and the Republicans grew, the President gradually adopted the practice expressed in a letter to Pickering:

> I shall not, while I have the honor of administering the government, bring men into any office of consequence knowingly whose political

tenets are adverse to the measures the general government is pursuing; for this, in my opinion, would be a sort of political suicide.

Although partisan feeling became intense during the administration of President Adams and a few party removals were made, it may be said that the administration of public business bore a better relation to the business standards of the country under the Federalists than in any subsequent period; and while there were evidences of the beginning of the spoils system, this practice did not seriously affect the efficiency of the civil service. With the election of Thomas Jefferson, the Republican party came into power, and, with the majority of the offices manned by Federalists, it is not surprising to find considerable pressure to force removals and to bring about a change in the personnel of the public service so as to be more nearly in accord with the popular verdict at the polls. Jefferson, however, laid down the rule of efficiency as the standard on which appointments were to be made and acceded to the demands of the partisans to change only a few officers for political purposes. However, by a few removals and by a gradual change as the time of appointments expired, the character of the civil service was changed, so that in five years it was regarded as strongly Republican as it had been Federalist in 1801. Despite this change, Jefferson adhered strictly to the idea of fitness for office as an essential. And it is generally conceded that the character of the civil service was not very seriously changed. With the Republican party in power and with most of the offices filled by Republicans, few changes in the civil service were made during the administrations of Madison and Monroe. The first specific change in the Federal civil service came with the passage of the four-year law, which was enacted in 1820. This act fixed the term of four years, in place of the tenure at the pleasure of the President, for district attorneys, collectors of customs, naval officers, revenue officers, public-land agents, and pay-

masters in the army. Although introduced on the theory of requiring an accounting every four years on the part of Federal officers and thereby securing greater efficiency, it is charged from the beginning that the act was secured for political purposes. Whether this be true or not, it was not long until the urgent demands of the spoilsmen resulted in extending the law to all offices and to the introduction of the idea of rotation in office as a primary principle in the Federal government.

The Introduction of the Spoils System.—The spoils system in the United States is built upon certain fundamental theories and policies which were introduced into the turmoil of party politics in the states, namely, the custom of using the public offices openly and continuously as ammunition in party warfare, and the evolution of the idea of rotation in office. Rotation gained ground rapidly in the states. It was urged that rotation would educate the public in the business of government, and that it would serve as a check to the overbearing insolence of office.

New York was the first state in which offices were openly and continuously used for partisan purposes. The practice, however, soon spread to other states, notably to Pennsylvania, where rotation in office was the rule as early as 1820. Though some of the states appeared to resist the rising wave of the spoilsmen, the majority of the commonwealths were soon forced into line. Among the last states to succumb were Massachusetts and some of the Southern states in which the spoils philosophy made headway slowly. By 1828, says Professor Fish,

> in every state throughout the North and West the spoils system either was established or there existed an element eager to introduce it. The movement was a growing one and it was but a question of time and circumstances when the custom would become national. . . . The people in general . . . disliked the life tenure and the aristocratic manners of the officials of the existing regime; those who enjoyed the national salaries should, they thought, be of the people. In the frontier states, particularly, the superb self-confidence born of the pioneers' single-handed victory over nature balked not at the full measure of democracy,

asserted that all men were created equally able to fulfil the duties of government offices.[1]

The outright adoption of the spoils system in the national government came with the election of Andrew Jackson to the Presidency, and there began "the first appearance of a species of four-year locusts that has never since failed to devastate our capital city." Great pressure was brought to bear for a complete removal of all men in offices. Although the number of removals made by Jackson was relatively small, the custom was firmly established that removals would be made for partisan purposes, and that an incoming President would recruit the civil service according to his own wishes and desires. While the spoils system was not the work of one man and was rather the result of gradual development, it is nevertheless true that Andrew Jackson and Martin Van Buren had more to do than any other men with the firm establishment and the extensive introduction of the system in the Federal and state governments. Although individual members of Congress and many political leaders spoke against the spoils system, each President in turn accepted the general principles of the system and participated sufficiently in the practice to bring about a change in the personnel of the Federal service. The theory of the spoils system is thus interestingly described by Carl Russell Fish:

> The true cause for the introduction of the spoils system was the triumph of democracy. If the people as a whole are to exert any tangible influence on the conduct of government, they must be organized. Unorganized, they may effect a revolution, but they cannot thereby control administration. The division of the people into parties is not sufficient to secure this pervasive influence; it gives them an opportunity to vote on special questions and at stated intervals, but not to select the questions or to vote when the issue is fresh in the public mind. If the majority is to mold the policy of the party, if the demos is to be kept constantly awake and brought out to vote after the excitement of the hour has passed away, it is necessary that the party be organized.

[1] C. R. Fish, *The Civil Service and the Patronage* (Longmans, Green & Co., 1905), pp. 103–104.

There must be drilling and training, hard work with the awkward squad, and occasional dress parade.

This work requires the labor of many men; there must be captains of hundreds and the captains of tens, district chiefs and ward heelers. Now, some men labor for love and some for glory; but glory comes only to the leaders of ten thousands, to the very few — it cannot serve as a general inducement, and even those who love must live. It is an essential idea of democracy that these leaders shall be of the people; they must not be gentlemen of wealth and leisure, but they must—the mass of them at any rate—belong to the class that makes its own living. If, then, they are to devote their time to politics, politics must be made to pay. It is here that the function of the spoils system becomes evident; the civil service becomes the pay-roll of the party leader; offices are apportioned according to the rank and merits of his subordinates, and, if duties are too heavy or new positions are needed, new offices may be created.[1]

The spoils system thus became an agency of reward for party services.

After 1845 the spoils system became triumphant. The victors divided the spoils and were unashamed. Though the number of removals made in any one executive term might vary, the general acceptance of the principle by all presidents and parties was universal. Along with the introduction of the spoils system came the democratic movement which resulted in the abolition of property qualifications for suffrage and which multiplied the number of elective offices, creating thereby a large number of places to be filled by the party organizations, which were now becoming strong and vigorous.

The Efforts to Check the Spoils System.—With the introduction of the spoils system came the first efforts to reform the civil service. As early as 1835 a committee of Congress was appointed to consider the whole subject of the reduction of the patronage and to report to the Senate such measures as seemed advisable. Few attempts at improvement were made, however, prior to 1850. In 1850 and in 1853 the question of efficiency was presented in reports

[1] C. R. Fish, *The Civil Service and the Patronage* (Longmans, Green & Co., 1905), pp. 156–157.

before the Senate. It was found that examinations had been tried in filling positions in the Treasury Department and that the system was approved by the members of the Cabinet. It was recommended that pass examinations be held for the lowest grades of clerkships and that all vacancies above these, except the chief clerkships, be filled by promotion. In 1853 pass examinations were prescribed by a law of Congress. The examinations were conducted by the heads of departments, and the act proved of slight benefit. An attempt was made in 1856 to establish a pass examination for the consular service, but this bill was soon repealed. The movement for reform was temporarily checked by the Civil War and later by the conflict between the President and Congress. In the meantime there had developed that interesting feature of American political life, senatorial courtesy, by which the wishes of Senators were first to be consulted and their recommendations to be regarded as virtually mandatory upon the President for the selection of the various officials within their states. Members of Congress naturally exercised considerable influence from the beginning; the Cabinet sometimes wielded power over the President; but the development of the machine and boss in the state brought to the front Senators who became the chief distributors of patronage.

Prior to 1860 no definite progress had been made in checking the control and domination of the spoilsmen in the Federal service. It was not until Thomas Allen Jenckes of Rhode Island, as a member of a committee on economy, became interested in the civil service in 1863 that the beginning of a definite reform was made. As a result of a thorough study of the civil service in England, he took up the cause of reform and introduced in 1865 a bill for the improvement of the civil service. The introduction of this bill led to the appointment of a select committee to investigate the matter. Mr. Jenckes, for a subcommittee, presented in 1868 an elaborate report which described the evils of the spoils system in the United States. "It con-

tained a thorough discussion of the existing service, careful summaries of the systems employed in China, Prussia, France, and especially England, and to it there was appended a bill intended to adapt the best points in these systems to American conditions."[1] Despite this thorough report, Congress refused to act. But agitation increased, particularly as a result of the devotion to the cause of such men as George William Curtis and Carl Schurz. President Grant was finally led to favor reform, and in his second message to Congress recommended a law which was to govern not only the tenure, but also the manner of making all appointments. Congress was, however, recalcitrant, and refused to accede to the President's wishes, with the exception of attaching a rider to the appropriation bill with the idea of leaving the matter entirely in the hands of the President. The President immediately appointed an advisory board, with Curtis as chairman, to report on the measures to be adopted. The first report was presented in December, 1871. In 1872 the rules formulated by this board were applied to the departments at Washington and to the Federal offices in New York. President Grant, however, refused to give the new movement his unqualified support, and Curtis soon resigned. In the next decade little progress was made, but the agitation was continued through civil-service-reform organizations and particularly through a national league which was launched in 1881 with Curtis as president. State societies were formed and a nation-wide campaign was inaugurated. The death of Garfield at the hands of a disappointed office-seeker finally brought the matter to a head, and a civil-service-reform bill drawn by Dorman B. Eaton was presented to Congress and finally passed. The bill was enacted in 1883, and the first commission appointed under the act at once began to enforce its provisions.

The civil service act of January, 1883, provided for the

[1] C. R. Fish, *op. cit.*, p. 211.

appointment of three civil service commissioners, whose duty it was to aid the President in the preparation of rules to carry the act into effect and to provide for open competitive examinations for testing the fitness of applicants for the public service. It was provided that the examinations were to be practical in character and in the main to relate to the fitness and capacity of applicants to discharge the duties of the service to which they sought appointment. The provisions of this act and the details as to its enforcement are adequately described in texts on American government.[1]

The close relation between the merit system and efficiency in the public service is so important that the question of reform of the civil service is one of the greatest issues in the line of improving the government service in the United States. Many obstacles stand in the way of the adoption of the merit system and its wide application in the government service in the United States. In the first place, there has been a failure to make distinct at times what is recognized in European countries, namely, that political offices such as Cabinet heads ought not to be and can not be placed under civil-service rules and requirements, but that administrative offices requiring technical training and experience ought to be permanent and should be brought under the merit system. The chief objection to the adoption of the merit system is the necessity of rewarding party workers—those who bear the brunt and responsibility of conducting party affairs. This large army of party workers, it is claimed, must be rewarded, and public offices constitute the only basis for reward. The spoils system has in large part been retained as a reward and incentive to keep going the elaborate party organization which began to develop in this country with the Democratic revolution from 1830 to 1840. But it is maintained that the cost of the system to the country in the incompetence, inefficiency, and corruption of the public service

[1] *Prepare an analysis of the Federal Civil Service Act.*

is too great a price to pay for the assistance of the party worker, and that it would be even better for the government to give a large sum to each organization than to support its workers in public offices. It is the necessity of finding some adequate means of paying for party services that retards the progress of the merit system. Great as this handicap undoubtedly is, it is slowly being overcome by the growing desire of the people that the government be placed upon the same plane of thoroughness and efficiency as other business enterprises and by the developing belief that the public service should be placed on a basis of merit and ability rather than be regarded as a reward for participation in partisan politics.

Progress and Problems of Civil Service Reform

But civil service reform in the United States has moved forward slowly, and at times it has actually retrograded. At first, Congress withheld the appropriation for the Civil Service Commission. Since the establishment of a permanent Civil Service Commission, every President has had to resist the pressure of spoilsmen and of the politicians.

> Almost every year has seen riders to appropriation bills providing exemption from the classified civil service, promotion of temporary patronage appointees, transfers which violate the letter or spirit of the civil service law, illegal participation of civil servants in elections and enforced contributions to party funds, four-year tenure laws, dismissals for political reasons, appointments through senatorial courtesy, and a dozen other forms of patronage and retrogression. Not a single administration at Washington since the act of 1883 has an absolutely clean reform record; and in most cases this is no fault of the President and the Cabinet.[1]

It was found that, in order to check the power of the spoilsmen a great campaign of education was necessary. For this purpose the National Civil Service Reform Association was formed, with the following object:

[1] Robert Moses, *The Civil Service of Great Britain* (Columbia University Studies in History, Economics, and Public Law), vol. lvii, no. 1, p. 247.

To establish a system of appointment, promotion, and removal in the civil service founded upon the principle that public office is a public trust, admission to which should depend upon proved fitness. To this end the association will demand that appointments to subordinate executive offices, with such exceptions as may be expedient, not inconsistent with the principle already mentioned, be made from persons whose fitness has been ascertained by competitive examinations open to all applicants properly qualified, and that removals shall be made for legitimate cause only such as dishonesty, negligence, or inefficiency, but not for political opinion or refusal to render party service, and the Association will advocate all other appropriate measures for securing integrity, intelligence, efficiency, good order, and due discipline in the civil service.

State organizations and national societies joined in the educational campaign, but progress was extremely slow. The most important positions were still filled by patronage. Laws did not originally provide for promotions, and these were based almost entirely on personal considerations. It was easy to discover grounds for removal or transfer. Evasions of the provisions of the law against political activity were disregarded, and the refusal to obey the law was frequently encouraged by the appointing officers. "While in response to public demand the dominant parties incorporated the principle in their platforms, this was done with mental reservations. Being negative in operation, the civil service law for many years has acted chiefly as an unwelcome restraint and check upon officials, without respect to their partisan affiliations." Primarily, the civil service acts in the United States have been interpreted as applicable to the filling of minor and clerical positions; consequently all the important positions remained in the hands of party leaders to be used as spoils for political rewards.

The spoils system dies hard. With its related ideas of short term and rotation in office, it has become an ingrained conviction in the minds of the politicians, and of the public, too, that offices should be openly and flagrantly used to reward personal political friends and to punish enemies. Men became accustomed to what Senator Hoar

called the "shameless doctrine," "that the true way by which power should be gained in this republic is to bribe the people with offices created for their service and the true end for which it should be used when gained is the promotion of selfish ambition and the gratification of personal revenge."[1]

The grip of the spoilsmen is evidenced in the slow and intermittent progress of civil service reform in the Federal government and the difficulties in introducing the merit system in the states. The somewhat discouraging results in the fight between the spoilsmen and those upholding the merit system are suggestively described by a committee in New York:

> The history of civil service legislation and its enforcement in the last thirty years in the state of New York shows how far the state has failed to realize the ideals of civil service administration. During this period, continuous pressure from the outside to confer favors has operated as the motive for establishing many unnecessary positions and creating fictitious or excessive salary rates. To counteract this, other forces have sought to impose with respect to the several branches of the civil service restriction after restriction which were primarily designed to prevent malpractice and removals rather than to insure efficient service. . . . Promotion is still largely secured by accident or personal preference. Standards governing the amount, kind, or quality of personal service to be rendered by state employees have not been established. The welfare of an employee after he has obtained an appointment is not considered from the viewpoint of intelligent public service. As a result, an utter lack of what might be termed *esprit de corps* is noticeable in the state government.
>
> The state of New York needs a constructive employment program for its governmental agencies, which looks toward the establishment of a permanent expert personnel. This means a fundamental reorganization of the present practice.[2]

The campaign for civil service reform, though a constant struggle, has gradually succeeded in reducing the number and the power of the spoilsmen and has given the merit

[1] Quoted in *Bulletin of Bureau of Municipal Research* (New York), No. 67, November, 1915, p. 4.

[2] *Bulletin of Bureau of Municipal Research* (New York), No. 76, August, 1916, p. 5.

system a wider application. The extension of the system to the higher positions of the Federal service and to many state municipal, and county officials is an indication of the growing acceptance of the merit principle.

Attempts to Secure Standardization of Positions and Salaries.—The purpose of the first civil service acts in states and Federal governments and of the efforts of the first civil service commissions was primarily negative in character. Such acts were designed to place a limit upon the appointive power of the executive and to remove some of the gross abuses which accompanied the development of the spoils system. Little thought was given to a constructive program of public employment, which would improve the conditions surrounding public officials and would study the needs of civil servants with a view to supervising their welfare and attaining greater efficiency in the government service. The results of this negative policy are thus described by the New York Bureau of Municipal Research:

> By the enactment of federal, state, and municipal civil service laws, the old methods of transacting the business of the government were not radically changed. Even as preventive measures they were in the nature of first steps. Important posts still remained the object of patronage. Promotion was still controlled by accident or personal preference. Devices for removal or transfer were easily invented. Standards governing the amount, kind, or quality of service to be rendered were not formulated. Evasions of the civil service law against political activity were connived at, if not actually encouraged, by those in authority. The original tendency to multiply positions in order to keep intact a political machine continued and the commissions themselves were bipartisan, recognizing the fact that the administration of the civil service regulations had not been taken out of politics. The welfare of an employee after he had obtained an appointment was not considered, except as it was involved in measures to prevent his untimely removal.[1]

And despite noteworthy advances made through civil service acts in raising the requirements for entrance to the

[1] "The Standardization of Public Employments," *Bulletin of Bureau of Municipal Research* (New York), No. 67, November, 1915, pp. 7–8.

service and improving the personnel in various branches of administration, glaring inequalities developed in the salaries paid for particular grades of work and in the different conditions prescribed for substantially the same service. "Standards of compensation for specified kinds of work as a basis for making salary appropriations are unknown," reported a committee of the New York Senate in 1915. Furthermore, positions are created for the most part without any definition of the work requirements or any real understanding of the work or needs to be served thereby. Civil service employments are, from the viewpoint of salary, standards, and related work conditions, in a chaotic state."[1] In order to remedy such defects in the public service a series of studies were begun to formulate some principles and standards for appointments, promotions, and salaries, and, in some instances, efforts have been made to apply the principles and standards developed. The objects of this movement for standardization are, to formulate a basis for the fixing of salaries in relation to work performed, so as to involve equal work for equal pay, to determine the factors of education or experience necessary for each grade of employment, and to establish standards to govern promotions and transfers.[2]

Though a beginning has been made in the inauguration of principles and standards both in appointments and in promotions, in a few states and cities the reform has made progress slowly and differences in methods and procedure, as well as the peculiar conditions involved in each instance,

[1] *Cf. Bulletin of New York Bureau of Municipal Research*, No. 67, November, 1915, pp. 13–14.

[2] *Cf. Bulletin of New York Bureau of Municipal Research*, No. 67, November, 1915, p. 17, and William C. Beyer, "Employment Standardization in the Public Service," *Supplement to the National Municipal Review*, June, 1920, p. 394. Attempts at the introduction of principles of standardization have been made as follows: Chicago, 1911; Oakland, California, 1915; Los Angeles County, California, 1915; Pittsburgh, 1915; New York State and City, 1916; Seattle, 1917; Ohio, 1917; Milwaukee, 1917; New Jersey, 1917; Cleveland, 1917; Akron, Ohio, 1917; Milwaukee County, 1917; St. Louis, 1918; Massachusetts, 1918; Dominion of Canada, 1919.

have made the adoption of standards extremely difficult. Recently an effort has been made to adapt the standard of wages to the cost of living and this has made the process even more complicated.

Unfortunately, the movement for standardization and uniformity in the tests for entrance to the civil service has not affected to any great extent the methods as prescribed by civil service commissions. This fact was emphasized in a recent paper read at the annual meeting of civil service commissioners:

> There is little or no uniformity in the plan of examination tests of the various civil service commissions throughout the country, and while but few examination plans have been considered, they are typical, and careful and painstaking analysis of two or three hundred different examination plans would show the same wide variation. The subjects of the relative weights in the several examinations considered do not fully indicate the wide variations that actually exist. Some commissions require certain definite preliminary education and training, and certain definite periods of experience, before an applicant is admitted to the examination. Other commissions apparently admit all who may apply, using the examination test itself as the one means by which those who are fitted for the position sought are separated from the unfit. Some require a certain percentage on essential subjects; others do not. In some cases a general average of 70 per cent represents the passing mark; in others an average of 75 per cent is required. In one instance little or no weight is given to the subject of "Experience and Training," while in another, for the same kind of employment, the weight given to this subject is the determining factor. One commission divides the examination into a number of separate subjects with separate weights, planned not so much for the purpose of discovering the special knowledge which the applicant may possess, but for the purpose of finding out his general educational qualifications and fitness. Another commission confines an examination of the same character to two or three subjects, laying emphasis only on the past experience and training and the special knowledge of the applicant.[1]

The most ambitious attempt at standardization was that inaugurated by Congress in the appointment of a Con-

[1] "Tackling Employment Problems," Report of the Twelfth Annual Meeting of the Assembly of Civil Service Commissioners, Rochester, 1919, p. 78.

gressional Joint Commission on Reclassification of Salaries.[1] It was made the duty of the commission to

> investigate the rates of compensation paid to civilian employees by the municipal government and the various executive departments and other governmental establishments in the District of Columbia, except the navy yard and the Postal Service, and report by bill or otherwise, as soon as practicable, what reclassification and readjustment of compensation should be made so as to provide uniform and equitable pay for the same character of employment throughout the District of Columbia in the services enumerated.

About 100,000 employees were comprised within the scope of the inquiry. In attempting to classify the employees doing substantially the same kind of work, needing the same general qualifications, and assuming about the same degree of responsibility the commission found it necessary to make 1,700 classes. Assistance was received from those who had gained experience in classification elsewhere and an effort was made to secure the co-operation of departments and employees. After an investigation of more than a year the commission reported to Congress that:

> The United States government, the largest employer in the world, is without a modern classification of positions to serve as a basis for just standardization of compensation, and without a central employment agency having adequate powers; in short, without an employment policy.
>
> This lack of a comprehensive and consistent employment policy, and of a central agency fully empowered to administer it, has produced most glaring inequalities and incongruities in salary schedules, pay-roll titles, and departmental organization, with much resultant injustice, dissatisfaction, inefficiency, and waste.[2]

A plan for standardization was presented to Congress for adoption with the recommendation that Congress strengthen the Civil Service Commission and authorize

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[1] See Report of the Congressional Joint Commission on Reclassification of Salaries submitting a classification of positions on the basis of duties and qualifications, and schedules of compensation for the respective classes. House Document No. 686, Sixty-sixth Congress, Second Session, March 12, 1920.

[2] Report, *op. cit.*, p. 8.

the commission to continue the study of standardization and to make such changes as are necessary to adjust the classes and salaries to meet new conditions and that the commission be authorized by Congress to provide for a comprehensive and uniform employment policy to be administered by a central personnel agency. To continue the work of systematization and standardization it was recommended that

> ... the Congress undertake a systematic examination of the functions now being exercised, the organization now in effect, and the methods of procedure in use in the several departments and independent establishments making up the Washington service, in order that unnecessary work, duplicated work, improperly allocated work, instances of poor organization, and expensive or inefficient methods of conducting business may be discovered and eliminated.[1]

In addition to the consideration of methods of recruiting the civil service and classification and standardization of those within the service special attention has been given recently in Federal and state governments to proposals for the retirement of public employees. It is recognized that the failure to provide retirement allowances is expensive to the government, since many continue in active service who are unable to do efficient work, and the retention of such employees checks the advancement of those who are performing their duties well. Though it is difficult to provide a system which will meet the needs of the service and will be financially practicable, a beginning has been made in the solution of this problem and the principles involved have been rather clearly formulated.[2]

The chief difficulty thus far has been due to the fact that most of the positions in the civil service are the minor and clerical positions. There have been few positions to which

[1] Report, *op. cit.*, pp. 23–24. For a summary of the findings and recommendations of the commission, consult Report, *op. cit.* pp. 22–132, and for the draft bill see pp. 133–145. To carry out the above recommendation there was created in December, 1920, a "Joint Committee on the Reorganization of the Administrative Branch of the Government."

[2] Lewis Merriam, *Principles Governing the Retirement of Public Employees* (D. Appleton & Co, 1918).

those having completed a university career might aspire; and furthermore, little progress has been made in recognizing the necessity of training for many branches of the public service. Efforts have been too much consumed in fighting the spoilsmen to give much attention to the positive side of public-service training and to provisions for a permanent tenure for those who prepare for the technical and professional branches of the service.

> We have been so busy fighting for a full realization of the competitive principle and so busy preventing retrogressions, that the great problems of division, of intellectual qualifications and examinations, of stimulating national education through civil service examinations and attracting the best men into our government departments, have been quite neglected.[1]

With the extension of the merit system to important administrative positions and the introduction of public-service training in the universities, we may look forward to the employment of a body of trained and permanently employed public servants, similar to the practice in the European countries where administrative efficiency has been attained.

Public Service in England and in France

Civil Service in England.[2]—As a basis for comparison and discussion, a short account of the recruiting of the civil service in England and in France is given. According to President Lowell, the English nation

> has been saved from a bureaucracy such as prevails over the greater part of Europe, on the one hand, and from the American spoils system, on the other, by the sharp distinction between political and nonpolitical officials. The former are trained in Parliament, not in administrative routine. They direct the general policy of the government, or at least they have the power to direct it, are entirely responsible for it and go

[1] Robert Moses, *op. cit.*, p. 249.

[2] The treatment of the Civil Service of England is condensed from the account by A. L. Lowell, *The Government of England* (The Macmillan Company, 1910), chaps. vii and viii.

out of office with the Cabinet; while the nonpolitical officials remain at their posts without regard to party changes, are thoroughly familiar with the whole field of administration and carry out in detail the policy adopted by the Ministry of the day.[1]

In short, England has recognized a distinction between, first, political, elective, and temporary officials who represent the people, and, second, permanent, nonpolitical, administrative officials. The permanent officials may not be members of Parliament, and they take no active part in politics. Permanence of tenure is based on custom rather than on law, and is supported by the theory that a man has a vested interest in the office that he holds. Although corruption of the worst sort was practiced in England in the eighteenth and nineteenth centuries, the spoils system of rewarding party workers and punishing opponents, and the idea of rotation in office never gained a firm foothold in England.

The improvement of the permanent civil service in England began with the introduction of pass examinations in some of the departments as early as 1834. In 1853 a movement was inaugurated to establish a system of open competitive examinations in the Indian service and in the permanent offices of the home government. Objections from the members of the House of Commons rendered it impossible to put the merit competitive system for home offices into effect prior to 1870. By an order in council the existing system of open competitive examinations was established. This order provides that for offices except those to which the holder is appointed directly by the Crown or those requiring professional or other peculiar qualifications, "no person shall be employed in any department of the civil service until he has been tested by the civil service commissioners, and reported by them qualified to be admitted on probation." The appointments are to be made through an open competitive examination,

[1] Lowell, *The Government of England* (The Macmillan Company, 1910), vol. i, p. 145.

and this method has been extended by subsequent orders until it covers the greater part of the positions where the work does not require peculiar qualifications or is not of a confidential nature or of a distinctly inferior or manual character.

First-class Clerkships.—For the first-class clerkships requiring work of an administrative and highly responsible character, the examinations are based largely on courses of study in the universities. Very few pass examinations who have had no university training. With regard to the character of the candidates, President Lowell observes:

> The candidates who win the appointments are men of education and intellectual power. They belong to the type that forms the kernel of the professions; and many of them enter the civil service simply because they have not the means to enable them to wait long enough to achieve success in a professional career. They form an excellent corps of administrators.[1]

Between the first and second divisions of clerkships has been established an intermediate branch in which the examinations and the qualifications are not so high as the first division, and which require greater training and skill than is necessary for the second-division clerks.

Second-division Clerkships.—Under this heading is classified a large body of officers whose work is merely clerical. The service in this division is of the same character as that performed by clerks in commercial houses, and the examination, as originally devised, was adopted to test immediate fitness for clerical work. In 1896 the system was changed so as to have the examination conform more nearly to the curricula of the schools. The result is that the real test for appointments is now based on general education rather than on technical knowledge, although proficiency in clerical duties continues to form a part of the examination.

Assistant Clerks and Boy Clerks.—Below the second-division clerks there are the assistant clerks and boy clerks,

[1] A. L. Lowell, *op. cit.*, p. 164.

whose duties are usually temporary, and the experience acquired may be used in lieu of examination for advancement into some of the minor positions. There are likewise a number of positions which are filled by a limited competition and others by examination in which merely a pass examination is necessary. The exemptions from competitive examinations are to be found chiefly at the top and the bottom of the service. There has been a tendency in recent years to enlarge the number of offices to be filled by examination and to reduce the number of exemptions. In general, it may be said that all clerks and assistants are selected through a system of open competition. "Very rarely a man is appointed from outside on account of family or political connections to a post for which he is not particularly fitted."[1] The existing arrangement in a typical department may be illustrated by the following outline:

Secretary Parliamentary Under-Secretary	Political.
Permanent Under-Secretary Assistant Under-Secretaries Chiefs of Branches	Usually nonpolitical and permanent.
First-class Clerkships Second-division Clerkships Assistant Clerks Boy Clerks	Nonpolitical—permanent open competitive examinations.
Messengers Porters Servants	Nomination without examination.

Not only has political influence been removed almost entirely from appointments to office in the administrative service, but it has also been nearly eliminated in the matter of promotion.

The civil service of England has become a career to which some of the best talent of the young generation

[1] Robert Moses, *op. cit.*, p. 197.

aspire. Although the salaries are not high, the attractiveness of the service has been enhanced by the provision for pensions, a feature which was introduced by the superannuation act of 1859. Grants have been made by this act to persons who have served in an established capacity in the permanent civil service of the state for at least ten years and retire at sixty years of age. Provision has been made also in the case of injuries received in public service.

Civil Service and the Cabinet.—Before leaving the civil service of England, it is desirable to note the relation between the temporary political officers of a department and the permanent subordinate officials. The function of the political chief is to bring the administration into harmony with the opinions of the constituents and especially of Parliament. He must keep his department in accord with the views of the majority in the House of Commons, and he must defend it when criticized, and protect it against any ill-considered action of the House. It is his duty to correct and prevent the tendency in the department to employ too much red tape. It is for him to decide upon the general policy to be pursued.

The permanent officials are to give their advice upon the questions that arise, so as to enable the head of the department to reach a wise conclusion and to keep from making mistakes. They keep the department running by doing the routine work. "In short, the chief lays down the general policy, while his subordinates give him the benefit of their advice and attend to the details."[1]

The smooth working of the system depends upon the extent of mutual respect and confidence between the Ministers and the permanent under-secretaries. The under-secretary is expected to give his advice frankly, but decision on important matters rests with the chief. A decision having been rendered, it then belongs to the under-secretary to carry it out. It is the duty of the political

[1] A. L. Lowell, *The Government of England* (The Macmillan Company, 1910), p. 182.

chief to seek the advice of his under-secretary, although this advice is likely to be limited to the details rather than include the general principles of policy on any public question. Though the final authority is in the hands of the political chief, owing to greater knowledge of details and technical information coming from experience, the permanent under-secretary is likely in the long run to direct and control the acts of the minister. The combination thus secured between the lay official who is subject to the popular will and required to defend his conduct before the popular representatives in the House of Commons and before his constitutents at home, and the permanent official who is a master of the details of government and an expert in the service, constitutes a superior and effective combination.

Civil Service in France.[1]—In France the qualifications for appointment to office are determined mainly by executive decrees and departmental regulations. For some of the technical and professional branches of the service the applicants are required to graduate from schools established by the government; for example, engineers are educated at the school of mines. For ordinary administrative positions the applicant must pass an open competitive examination. Candidates for office are required to give evidence of a good general education. It is customary to require a diploma, such as bachelor of letters and science, or a bachelor of laws. In some cases higher degrees are demanded.

The degree of bachelor of letters is required for positions in the central administration of the treasury, in the department of foreign affairs and the diplomatic and consular service, and in the departments of war and agriculture. The degree of licentiate in law is necessary to obtain the position of chief of bureau in the department of justice and in the general inspection of the finances and for certain positions in the diplomatic and consular services.[2]

[1] Condensed from the account of F. J. Goodnow in *Comparative Administrative Law*, student's edition (G. P. Putnam's Sons, 1903), vol. i, pp. 266–295.

[2] F. J. Goodnow, *op. cit.*, vol. ii, p. 47.

Examinations are conducted by officers in the departments into which entrance is sought and are under the supervision of the heads of the departments. There is no civil service board or commission as in the United States. The French place great reliance upon the term of probation. The length of the term is often as long as two years. The candidate is usually not given a salary during the term of his probation. As in the United States, the higher positions, which are regarded as in the main political, are not subject to the above requirements.

It is impossible to give an account of the methods of recruiting the civil service in other European countries, but extensive use has been made of the merit system in the filling of public offices and particularly in the higher administrative branches of the public service.

The leading nations of Europe, then, have committed themselves fully to the idea that the service of the state requires a large body of men carefully and thoroughly trained; in consequence, a system of higher instruction has been adopted to meet the needs of these nations. To anyone who examines the administrative systems of European countries—the administration as distinguished from the politics or policy-determining activities—it is clear that the science of administration is considered of prime significance. Entrance to this service requires, as a rule, a thorough secondary education, the equivalent of practically a college course in the United States, and, in addition, advanced instruction leading to a higher degree is frequently demanded with rigorous examinations before admission to the service. In short, the subject of administration is regarded in the universities, as well as among men of administrative affairs, as calling for just as much thoroughness, study, and scientific accuracy as any other branch of university education. In fact, in France and Germany the training for government service has a standing equal, if not superior, to that for the other learned professions.

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Part III

PRINCIPLES AND PROBLEMS OF GOVERNMENT ORGANIZATION AND ADMINISTRATION

CHAPTER I

CONSTITUTIONS AND CONSTITUTION-MAKING

With but few exceptions the governments of to-day are based upon fundamental charters known as constitutions. A constitution has been defined as "the fundamental law according to which the government of a state is organized and the relations of individuals with society as a whole are regulated." It may be either a document or a collection of acts promulgated at a certain time, or it may be the result of a series of legislative acts, judicial decisions, precedents, and customary regulations. Most of the constitutions of to-day consist of a single document. But the English Constitution, the one from which all the others are in a certain sense derived, has never been put into systematic form.[1]

The Origin of Constitutions

The written constitution is a comparatively new device in government. However, the distinction between certain laws that are fundamental and permanent and others that are temporary and changeable is indeed an ancient idea. This distinction was recognized in Greece and in Rome, and was made more definite and specific in the Middle Ages when the ancient law of nature was supplemented by the law of God to give strength and permanence to the rules and regulations laid down by the Church. But while the distinction between fundamental and permanent laws and

[1] See Charles Borgeaud, *The Nature and Adoption of Written Constitutions* (The Macmillan Company, 1895), Preface, p. xv.

ordinary legislative or executive acts was recognized in ancient and mediæval times, no clear dividing line was designated between the laws which were fundamental and those which were temporary. There were no written documents to set off the permanent from the temporary laws.

It was not until the middle of the eighteenth century that the distinction between fundamental law and temporary statutory law was rendered specific by French and English authors. The distinction was most clearly presented in Vattel's volume on *The Law of Nations*, which appeared in France in 1773, was translated into English, and was widely read in England and in America. Vattel declared that

> . . . the laws made directly with a view to the public welfare are political laws; and in this class, are those that concern the body itself and the being of society, the form of government, the manner in which the public authority is to be exerted, those, in a word, which together form the constitution of the state, are the fundamental laws.[1]

These fundamental laws, Vattel maintained, are not to be changed by the legislature, and are to be regarded as inviolable except at the wish of the nation itself. This doctrine, supported as it was by the mediæval theory of the law of nature, regarded superior to and above the ordinary laws, and strengthened by Sir Edward Coke's theory that the common law was superior to both king and Parliament, led to the development of the idea that the fundamental laws must be put into the form of a well-defined and clearly written document. The instrument of government prepared by Cromwell appears to be one of the first documents of this kind.

Written constitutions in the sense in which they are regarded to-day originated, however, with the American colonies, when they repudiated the governments established under their charters with England and set about to establish new governments. An effort was made to pre-

[1] *The Law of Nations* (Trans. London, 1797), p. 9.

pare in brief written form the fundamental rules and regulations in accordance with which the government was to be conducted. A great impetus was given to the notion of instituting governments founded on written constitutions by the formation and adoption of the Federal Constitution, 1787-89. Very soon thereafter, the revolutionary governments of France attempted to base public authority upon fundamental written laws. South and Central American countries have adopted constitutions modeled in some respects after the American charters. The majority of European countries have also formulated a fundamental document for the guidance of political authority, with the exception of England and Hungary, in which no written instruments such as those adopted in the United States have ever been formulated. The distinction between the constitution and ordinary law in the latter countries is not well defined. The movement for the adoption of a written constitution has extended not only into Europe and America, but also into Asia and Africa. Among recently adopted constitutions are those of Japan, of China, and of the South African Union. Likewise, the self-governing colonies of Canada and Australia have organized their government on the basis of written fundamental laws, which are superior to ordinary enactments. The newly formed provinces of Central Europe are engaged in the drafting of written fundamental laws. Thus, the development of written constitutions is one of the leading characteristics of the eighteenth and nineteenth centuries, and constitutes one of the greatest achievements in government organization.

Types of Constitutions

The distinction between such countries as England, where the constitution is unwritten and where no separate document has ever been issued containing the fundamental law, and the United States, with a written constitution, has probably been exaggerated. While England has no

definite written document, most of the matters of fundamental importance have been dealt with in special statutory enactments which may be looked upon as forming a constitution; whereas in the United States matters not covered in the fundamental law are also treated in statutes. In the words of James Bryce, "Whether the constitution be written or unwritten, provision must be made for its growth and the written constitution must necessarily grow just as well as the unwritten constitution."[1] The efficacy of written documents in securing good government was very much exaggerated in the eighteenth and nineteenth centuries. It is a noteworthy fact that two of the greatest political organizations of all times, those of Rome and of England, were not based on written instruments. Certain South American nations have shown how an elaborately drawn document can be readily ignored and governments conducted, notwithstanding such documents, according to the wishes of dominant cliques. On the other hand, the political bonds between England and the self-governing colonies demonstrate that an intricate political mechanism can operate successfully with very few written formulations.

The former distinction between written and unwritten constitutions has been demonstrated to be more one of degree than of kind. In fact, all constitutions are contained in documents, statutes, and numerous written evidences of law and custom which are uniformly accepted as a guide for public officers. Thus, the English constitution is largely written, only it is not found in a single instrument. It is embodied in many documents and statutes, and the part played by custom is unusually large.[2] On the other hand, states having so-called written constitutions have so much of custom, tradition, judicial, legislative, and executive interpretation entering in with the written document that the constitutional law of the country must be sought in

[1] James Bryce, *Studies in History and Jurisprudence* (Oxford University Press, 1901), vol. i, pp. 139 ff.

[2] A. Lawrence Lowell, *Government of England* (The Macmillan Company, 1910), vol. i, Introductory Note.

many sources as well as in the written instrument. For example, in the United States political parties and the President's Cabinet are not dealt with in the fundamental law, yet each of these is a very important and integral part of the government. We may think, says Judge Cooley, "that we have the Constitution all before us; but for practical purposes, the Constitution is that which the government in its several departments and the people in the performance of their duties as citizens recognize and respect as such."

A further distinction has been made between constitutions which are flexible and those which are rigid. The basic difference in this regard is to be found in the constitution of England, which is subject to change by an ordinary act of Parliament, and the Constitution of the United States, which requires a special procedure and extraordinary majorities to pass constitutional amendments. But there is a tendency for this distinction to disappear. When the process of constitution-changing involves a different organization, larger majorities, or other distinguishing marks from the passage of ordinary legislation it is possible to separate the constituent or constitution-making function from legislation and thus to recognize degrees of rigidity or flexibility in changing the fundamental law. But some states, such as Italy, do not separate the constituent and the legislative functions. The Italian constitution, with no provision for amendment, is changed by an ordinary legislative act. Furthermore in Switzerland and certain American states the constitution may be amended by the initiative and referendum under the same regulations as those set forth for the passage of ordinary statutes. In such states it is impossible to draw a well-defined line between constituent and legislative powers. Moreover, there is a distinct tendency to make all constitutions easier to amend and thus to obliterate the distinction between flexible and rigid constitutions.

The chief types of constitutions are exemplified in the

fundamental laws of England, France, and the United States. The principal characteristics of the English constitution, as stated by President Lowell, are:

> First, that no laws are ear-marked as constitutional—all laws can be changed by Parliament, and hence it is futile to attempt to draw a sharp line between those laws which do and those which do not form a part of the constitution; second, the large part played by customary rules, which are carefully followed, but which are entirely devoid of legal sanction.[1]

The term *constitutional*, as applied to English law, means nothing more than that an act passed by Parliament is in harmony with the spirit of the English constitution. The negative term *unconstitutional* has no significance as applied to acts of Parliament, since they cannot be regarded as a violation of the fundamental law and in consequence void.

While the French Constitution, unlike the English, is a definite written document, it nevertheless gives wide latitude to the legislature and provides only in part for the general organization and distribution of public powers. The French Constitution is dependent for its interpretation and enforcement on the judgment and will of the legislature. To the French, then, the constitutionality of an act has no other purport than that the legislature does not regard the measure contrary to the articles of the Constitution. Constitutional law forms an insignificant part in the government of France.

In the United States the Federal Constitution is regarded as the fundamental law which imposes a superior obligation upon the legislature and the executive, and legally restrains them from taking any action contrary to its provisions. If at any time either the executive or the legislature oversteps the limits of the powers as prescribed for each by the written instrument, the judiciary interposes its judgment and suspends such action, as is regarded in

[1] A. Lawrence Lowell, *Government of England* (The Macmillan Company, 1919), vol i, p. 9.

opposition to the Constitution. This is what is meant by the unconstitutionality of an act of Congress—namely, the judiciary has decided that the measure is contrary to the fundamental law and has declared it void on that ground.

Constitutions, as they have just been described, naturally fall into two main classes: those in which the constitution is guarded and protected by the judiciary, and those in which the constitution is in the hands of the legislature for its interpretation and the declaration of its meaning. In the United States a well-defined and somewhat elaborate bill of rights, which the courts are charged to protect against the encroachments by the government, renders the Constitution a very important document from the standpoint of the individual, and constitutional law takes a prominent place in legal study and practice. In Canada and Australia, where either a bill of rights is omitted or very few individual rights are inserted in the constitution, the constitution has less significance. And in France, where the interpretation of the Constitution belongs to the legislature and no specific bill of rights is included therein, constitutional law becomes of minor importance.

Constitutional Government

Constitutional government has been accurately and systematically developed in the United States—so much so that the American concept of a written constitution has formed a basis and starting point for many modern constitutions.

Constitutional government from the American point of view has been defined as a system in which there is a government of laws and not a government of men.[1] It involves the formulation of rules through which the actions of public officers are controlled. The history of constitutional gov-

[1] See F. J. Goodnow, *Principles of Constitutional Government* (Harper & Brothers, 1916), pp. 2–3.

ernment has been aptly characterized as the process of definition, method, and machinery through which a more or less definite understanding is arrived at between the governors and the governed. In many instances the rules or laws have been self-imposed and have been regarded as the publication of the requirements and limitations of public authority. Constitutional government, however, has been the result of an effort of the state to define regulations for those who are called upon to govern.

A government of laws and not of men is a dictum which, like many others, contains an element of truth with a considerable admixture of error. "There never was such a government," says an eminent statesman; "constitute them how you will, governments are always governments of men, and no part of any government is better than the men to whom that part is intrusted."[1]

It is no doubt true that personality enters into all government administration and that individual views influence and more or less determine the nature of all public actions. The element of personality and individual political theories are not eliminated in a constitutional government. It is rather that some of the rules of political action are more clearly defined and that those in public authority are expected to follow certain requirements and limitations.

One of the chief objects of constitutional government is the protection of the individual in his rights and liberties. To render individual rights secure there has been a tendency to formulate them into the now familiar parts of fundamental charters known as bills of rights. Government action is to be restrained from infringing on the personal rights of the individual as to his life, his person, or his property. Freedom of speech, freedom of assembly, and freedom of worship are also to be preserved, and various other interferences with individual freedom are to be pro-

[1] Woodrow Wilson, *Constitutional Government in the United States* (The Columbia University Press, 1908), p. 17.

hibited. To render these restrictions secure, it has been deemed necessary to give the individual recourse particularly against the action of legislative and executive officers and to place the protection of individual rights in the hands of the judiciary.

Since constitutional government based on a written instrument has been developed more fully and specifically in the United States than elsewhere, it is necessary to note the peculiar principles of constitutional government in the United States. These principles are well expressed in the words of President Wilson:

> We may summarize our view of constitutional government by saying that its ultimate and essential objects are:
>
> 1. To bring the active and planning will of each part of the government into accord with the prevailing popular thought and need, in order that government may be the impartial instrument of a symmetrical national development;
>
> 2. To give to the law thus formulated under the influence of public opinion and adjusted to the general interest both stability and an incorruptible efficacy;
>
> 3. To put into the hands of every individual, without favor or discrimination, the means of enforcing the understandings of the law alike with regard to himself and with regard to the operations of government, the means of challenging every illegal act that touches him.
>
> And that, accordingly, the essential elements and institutions of a constitutional system are:
>
> 1. A more or less complete and particular formulation of the rights of individual liberty—that is, the rights of the individual against the community or its government—such as is contained in Magna Carta and in the Bills of Rights attached to our constitutions;
>
> 2. An assembly, representative of the community or of the people, and not of the government: a body set to criticize, restrain, and control the government;
>
> 3. A government or executive subject to the laws, and
>
> 4. A judiciary with substantial and independent powers, secure against all corrupting or perverting influences; secure, also, against the arbitrary authority of the government itself.[1]

[1] Woodrow Wilson, *Constitutional Government in the United States* (The Columbia University Press, 1908), pp. 23–24.

To understand the trend in modern constitution-making, it is also necessary to summarize the general characteristics of the American concept of a written constitution.

The American Concept of a Written Constitution

General Principles.—The American theory of a written constitution is based upon three important principles: first, that a written constitution is a fundamental and paramount law and consequently superior to ordinary enactments; second, that the powers of the legislature are limited, the written constitution being in the nature of a commission to the legislature by which its powers are delegated and its limitations defined; third, that judges are the special guardians of the provisions of written constitutions, which are in the nature of mandatory instructions to the judges who must uphold these provisions and refuse to enforce any legislative enactment in conflict therewith. Furthermore, an underlying idea back of all written constitutions in the United States is the theory of natural rights.[1]

It is a matter of common knowledge that natural law and natural rights were among the dominant ideas of the leaders of the American Revolution as well as the framers of our first constitutions. James Otis, Samuel Adams, John Adams, Thomas Paine, Patrick Henry, and Thomas Jefferson, with others, combined to render the natural-rights notion popular. According to the Declaration of Independence, men are endowed with certain inalienable rights; among these are life, liberty, and the pursuit of happiness. Many of the revolutionary patriots believed, with Dickinson, that liberties do not result from charters; charters, rather, are in the nature of declarations of pre-existing rights. They are founded, according to John Adams, "in the frame of human nature, rooted in the constitution of the intellectual world." Most significant of all

[1] *Cf.* C. G. Haines, *The American Doctrine of Judicial Supremacy* (The Macmillan Company, 1914), chap. iii.

is the fact that constitutions, Federal and state, were framed when the natural-rights philosophy was particularly prevalent. In bills of rights, in occasional phrases in the body of constitutions, and in the general opinion regarding the nature of constitutions are to be found evidences of natural rights, such, for example, as are expressed in the New Hampshire constitution, which declares that "all men have certain natural, essential, and inherent rights; among which are—the enjoying and defending of life and liberty—acquiring, possessing and protecting property—and in a word, of seeking and obtaining happiness." It was generally thought that governments were instituted primarily to render more secure these pre-existing rights[1] and that it was essential to formulate them into fundamental charters.

Written constitutions as the origin and source of law in the United States developed from charters granted originally to trading companies. These, as fundamental acts of government, were modified and transformed through a group of ideas comprising a higher law of nature above all human enactments, a theory of the supremacy of the common-law courts, and Vattel's idea of a final written law superior to ordinary statutes. The general principles of the American theory of a written constitution, first formulated in colonial cases and in early state and Federal decisions, are best stated in the language of John Marshall; and on account of its significance in the American government and as a model in later interpretation of constitutions, the statement of Marshall deserves to be quoted in full:

> The authority, therefore, given to the Supreme Court, by the act establishing the judicial courts of the United States, to issue writs of mandamus to public officers, appears not to be warranted by the Constitution; and it becomes necessary to inquire whether a jurisdiction so conferred can be exercised.
>
> The question, whether an act repugnant to the Constitution can become

[1] *Cf.* "The Law of Nature in State and Federal Judicial Decisions," *Yale Law Journal* (June, 1917), vol. xxv, pp. 617 ff.

the law of the land, is a question deeply interesting to the United States; but, happily, not of an intricacy proportioned to its interest. It seems only necessary to recognize certain principles, supposed to have been long and well established, to decide it.

That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it nor ought it to be frequently repeated. The principles, therefore, so established, are deemed fundamental. And as the authority from which they proceed is supreme, and can seldom act, they are designed to be permanent.

This original and supreme will organizes the government, and assigns to different departments their respective powers. It may either stop here or establish certain limits not to be transcended by those departments.

The government of the United States is of the latter description. The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the Constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation. It is a proposition too plain to be contested, that the Constitution controls any legislative act repugnant to it; or, that the legislature may alter the Constitution by an ordinary act.

Between these alternatives there is no middle ground. The Constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it.

If the former part of the alternative be true, then a legislative act contrary to the Constitution, is not law; if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable.

Certainly all those who have framed written constitutions contemplated them as forming the fundamental and paramount law of the nation, and, consequently, the theory of every such government must be, that an act of the legislature, repugnant to the Constitution, is void.

This theory is essentially attached to a written constitution, and is consequently to be considered, by this court, as one of the fundamental principles of our society. It is not, therefore, to be lost sight of in the further consideration of this subject.

If an act of the legislature, repugnant to the Constitution, is void,

does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory; and would seem at first view an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration.

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

So if a law be in opposition to the Constitution; if both the law and the Constitution apply to a particular case, so that the court must either decide that case comformably to the law, disregarding the Constitution, or conformably to the Constitution, disregarding the law, the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

If, then, the courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply.

Those, then, who controvert the principle that the Constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the Constitution and see only the law.

This doctrine would subvert the very foundation of all written constitutions. It would declare that an act which, according to the principles and theory of our government, is entirely void, is yet, in practice, completely obligatory. It would declare that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure.

That it thus reduces to nothing what we have deemed the greatest improvement on political institutions, a written constitution would of itself be sufficient, in America, where written constitutions have been viewed with so much reverence, for rejecting the construction. But the peculiar expressions of the Constitution of the United States furnish additional arguments in favor of its rejection. . . .

Thus, the particular phraseology of the Constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the Constitution is void; and that courts, as well as other departments, are bound by that instrument.[1]

[1] Marbury *v.* Madison, 1 Cranch 137 at 176 to 180.

The principles thus announced by Marshall are based primarily upon the assumption that the judiciary was to become the protector and guardian of the fundamental law. Through a long line of state decisions and Federal precedents, these principles were finally asserted and maintained to the effect that it was the right and the duty of courts to invalidate legislative acts in conflict with the fundamental law. In practically every case where there was resistance to judicial decisions invalidating legislative acts the court's opinion and judgment ultimately prevailed and executive and legislative censure tended only to strengthen judicial power. Finally, the fact that the other departments of government deferred to the judgment of the courts, although there was no legal requirement that they should do so, tends to show that it was the acceptance of certain fundamental notions of law and government which led men to sanction and support the underlying principles of the American theory of written constitutions.

Why was this novel adventure in political affairs adopted in the United States? Strange as it may seem, virtually all of the reasons which are ordinarily given for the adoption of this feature of our government fail to account for this peculiar phenomenon. The reasons for the adoption of the American doctrine of constitutional law as defined by John Marshall are as follows:

1. The Constitution is a law of superior obligation and consequently any enactments contrary thereto must be held invalid.
2. The courts must exercise this power in order to uphold the terms of a written constitution or, in other words, a written constitution necessitates the exercise of this power by the judiciary.
3. The oath of judges to support the Constitution requires that justices follow the Constitution and disregard the statute.
4. Legislative acts contrary to the Constitution are *ipso facto* void, consequently the courts are obliged to disregard such statutes.

It is easy to demonstrate, as was done by Justice Gibson in 1825,[1] that not one of the above reasons in any way ex-

[1] Eakin *vs.* Raub, 12 Sergeant & Rawles, 330.

plains or justifies the use of this extraordinary power by the judiciary. First, if the Constitution is a law of superior obligation, on what ground does the court insist that its judgment is superior to that of the legislature which has enacted the law? Second, is such a power necessary to uphold the terms of a written constitution? If so, why do many constitutions of recent times deliberately take away from the courts this extraordinary power, or perhaps never grant such authority? With regard to the oath in support of the Constitution, all officers, including the members of the legislature, judges, and executive, take the same oath. Why does the oath of the judges give them authority to scan the efforts of the lawmakers?

Why should a legislative act passed in due form, following all the laws of procedure, be held as never having been passed or *ipso facto* void? Is it not presumptuous to assume that the bona fide acts of any one department may be declared by another to be of no avail? In fact, as indicated by Justice Gibson, every argument in favor of this doctrine begins by assuming the whole ground in dispute, and this line of argument is particularly evident in Marshall's monumental opinion. If the reasons as given by John Marshall and other judges in judicial decisions are not valid and conclusive, how, then, may this principle be accounted for? The real answer to the question is best expressed in the language of Professor Burgess:

> We must go back of statutes and constitutions for the explanation. It is the consciousness of the American people that law must rest upon reason and justice, that the Constitution is a more ultimate formulation of the fundamental principles of justice and reason than mere legislative acts, and that the judiciary is the better interpreter of those fundamental principles than the legislature. It is this consciousness which has given such authority to the interpretation of the Constitution by the Supreme Court, and I may add, it is this consciousness which has resulted in establishing in the United States what may be termed the supremacy of the judiciary.[1]

[1] John W. Burgess, *Political Science and Constitutional Law* (Ginn & Co., 1902), vol. ii, p. 365.

The underlying principles, then, on which the American theory of a written constitution are based are as follows:[1]

First, *a distrust of legislative power.* It was generally thought, at the time that American constitutions were formed, that the legislative authority ought to be restricted and that special precaution should be taken to protect the people against legislative domination. The prevailing theory of the time was thus summed up by Thomas Jefferson:

> The concentrating of all powers in a legislative body is precisely the definition of despotic government. One hundred and seventy-three despots would surely be as oppressive as one. An elective despotism was not the government we fought for but one which should not only be founded on free principles, but in which the powers of government be so divided and balanced among several bodies of magistracy, as that no one could transcend their legal limits without being effectually checked and restrained by the other.

Second, *protection of the minority.* To protect the minority against the danger of oppressions by majority rule was another purpose which the founders of the American government set about to accomplish in the process of constitution-making. At that time the danger of oppression by majority rule was greatly feared, and it was decided "that the majority must be rendered by their number and local situation unable to concert and carry into effect schemes of oppression." It was thought by Madison and others that the merits of the Federal Constitution lay in the fact that it secured the rights of the minority against "the superior force of an interested and overbearing majority."

Third, *protection of property rights.* A third principle underlying the process of constitution-making was the belief that property was a sacred right, which it is the supreme function of the government to preserve and protect. The favored position of property and property rights under

[1] *Cf.* C. G. Haines, *The American Doctrine of Judicial Supremacy* (The Macmillan Company, 1914), pp. 185 ff.

the American constitutional system has been thus expressed by President Hadley:

> It is evident that large powers and privileges have been constitutionally delegated to private property in general and to corporate property in particular. . . . The general status of the property owner under the law cannot be changed by the action of the legislature or the executive, or the people of a state voting at the polls, or all three put together. It cannot be changed without either a concensus of opinion among the judges, which should lead them to retrace their old views, or an amendment of the Constitution of the United States by the slow and cumbersome machinery provided for that purpose, or, last—and I hope most improbable—a revolution.
>
> When it is said, as it commonly is, that the fundamental division of powers in the modern state is into legislative, executive, and judicial, the student of American institutions may fairly note an exception. The fundamental division of powers in the Constitution of the United States is between voters on the one hand and property owners on the other. The forces of democracy on one side, divided between the executive and legislature, are set over against the forces of property on the other side, with the judiciary as arbiter between them; the Constitution itself not only forbidding the legislature and executive to trench upon the rights of property, but compelling the judiciary to define and uphold these rights in a manner provided by the Constitution itself.[1]

Since the formulation of these fundamental principles, constitutions have undergone considerable change. When written constitutions were first framed, there was a disposition to include therein the bare framework of the government with the organization of the great departments. In America, the Bill of Rights was soon incorporated and came to be regarded as an integral part of the Constitution. Later the method of amendment and revision was dealt with in detail as one of the essentials of the fundamental law. From the standpoint of these fundamentals the Federal Constitution is regarded as a model, because it is confined to those provisions which are regarded as indispensable. Recent constitutions include many details

[1] From *The Independent*, vol. lxiv (April 16, 1908), p. 834.

which were formerly covered by ordinary legislative enactments.

Principles of State Constitutions

The first state constitutions which were adopted in 1776 were characterized by brevity. Comprising but a few pages, the documents were in the nature of temporary charters prepared to meet an emergency. A bare framework of government, including legislative, executive, and judicial departments, and, in a few cases, a short bill of rights, constituted the first fundamental laws of the states. Numerous powers were placed in the legislature. This branch was accorded authority over the judiciary in the appointment of judges, and at times acted as a final court of appeal. Under some of the constitutions, the Assembly selected and, to a large extent, controlled the Governor. It is not surprising to find men objecting to the fact that the legislature was gathering all of the powers of government into its hands. Definite limits were set to legislative action in certain respects, and it was declared that these limits were not to be exceeded. In only a few states, however, was any machinery provided, such as a council of censors, to safeguard the constitution from legislative encroachments.

The constitution was, as a rule, not based on popular sanction. Some of the constitutions were drafted by revolutionary conventions or by the legislatures and were put into effect without the express authority of the people. The most satisfactory procedure was devised in Massachusetts, when, in 1779, the legislature submitted to the people the proposal of electing delegates to a special constitutional convention. On a vote of approval, the legislature called an election of delegates, who drafted a new constitution and submitted it to a popular referendum. This method is interesting, in view of the fact that it has come to be the established practice of providing for a total revision of state constitutions.

In so far as the practice of making and approving these constitutions differed from the procedure in passing ordinary laws, the distinction between constitutional law and statutory law was first established. This distinction has come to be known as the fundamental principle of American constitutional development.

The principle of the separation of powers, first clearly formulated in the constitution of Massachusetts, is one of the foremost tenets of state government. It is declared in this Constitution that "in the government of this commonwealth the legislative department must never exercise the executive and judicial powers or either of them. The judicial shall never exercise the legislative and executive powers or either of them to the end that it may be a government of laws and not of men." Other constitutions usually added a provision to the effect that the legislative, executive, and judicial powers shall be separate and independent. The general belief of the time was well expressed by Madison to the effect that "the accumulation of all powers, legislative, executive, and judicial, in the same hands, whether one, a few, or many and whether hereditary, self-appointive, or elective, may justly be pronounced the very definition of tyranny." Thus a doctrine of separation of powers formulated into a theory by Montesquieu was put into practice in the American states, and has resulted in an adjustment of relations between the various divisions of government which is practically unique in the American commonwealth. While a great many changes and modifications of the rule of separation have been necessary, the general principle has been retained throughout the development of state constitutional law. Along with the theory of the separation of powers came the doctrine of checks and balances, by which it was determined that the powers of government should be divided and balanced so that the possibility of exceeding legal limits would be effectually checked and restrained in each department.

The theory of the separation of powers, with the accom-

panying system of checks and balances, once the admiration of American statesmen, is now subjected to widespread criticisms. Many years ago Mr. Goodnow contended that to our system of checks and balances is to be attributed the extraordinary growth and power of party machinery in the United States. The machine and the boss in American politics were, it was maintained, the direct result of the division of powers into many hands and the manifold provisions for checking public authority. Directness and concentration, necessary features in public administration, were thus secured in an indirect manner and were largely independent of the framework of government established in constitutions and laws.[1]

To another keen observer of American political practices the theory of checks and balances is one of the prime causes of the prevalence of political corruption. The attack upon this one-time popular theory was more recently presented by another opponent:

> Political institutions in America have been designed on the principle of distrust. Fear of the people, fear of the legislature, fear of the executive, have inspired constitution-makers and lawmakers from the very beginning. Fear has shaped our political machinery in city, state, and nation. . . . This distrust of the people on the one hand and of officials on the other led to the creation of innumerable checks on freedom and obstacles to action. Instead of simplicity there is confusion. In place of directness there is indirectness. For responsibility there is irresponsibility.[2]

Among the results of what is termed "the philosophy of distrust" are the rigidity of Federal and state constitutions, which are often very difficult to amend; two legislative chambers, one to serve as a check on the other and both to be subject to an executive veto; and the power of the courts to review legislation and thus in many instances to have the final word as to the meaning of written consti-

[1] See F. J. Goodnow, *Politics and Administration* (The Macmillan Company, 1900), for an illuminating discussion of this view.

[2] F. C. Howe, "The Constitution and Public Opinion," *Proceedings of the Academy of Political Science* (October, 1914), p. 7.

tutions. At no time, in the United States, says Mr. Howe, "can the settled conviction of the public impress itself upon the whole government as is possible under the British parliamentary system."

The principle of the separation of powers, with its corresponding feature of checks and balances involving the division of public authority, the lack of concentration in administration, and the absence of a definite location of responsibility, has been, in a large measure, discarded in city government in the adoption of commission government and the city-manager type of charters. Numerous state committees and commissions have recently made recommendations which call for concentration of authority and the location of responsibility. It is recognized now that, whether in Federal, state, or local governments, division of authority and checks and balances are barriers to efficient administration. The division of powers into executive, legislative, and judicial retains its fundamental validity as requiring the separation and division of functions into the making and administration of law. But it is now commonly conceded that the making and the enforcement of the law must be carried out in unity of purpose and practice, and that law enforcement must in a measure be subordinated to the large ends and aims defined by the departments representative of the popular judgments.

A second principle in the making of state constitutions was developed from the eighteenth-century concept of natural law and natural rights. The doctrine of natural rights was stated most clearly in the Declaration of Independence, where it was affirmed that "we hold these truths to be self-evident that all men are created equal, that they are endowed by their creator with certain inalienable rights, that among these are life, liberty, and the pursuit of happiness." There has been much discussion as to the significance of this pronouncement, many insisting that there are no natural rights and that the doctrine has no foundation in fact, and others maintaining that all govern-

ment in the United States is essentially based upon the general concept of liberty declared under this provision. Despite these differences of opinion, this notion has had a controlling effect in impressing on the people the idea that the government is not an arbitrary mechanism, but that it is an institution designed to provide, as Jefferson declared, "equal opportunity to all, special privileges to none." The theory of natural rights has been frequently upheld by the courts in supporting the rights and liberties of the citizens and has received the approval of the Supreme Court of the United States in some fundamental decisions.[1] In support of the doctrine of natural law, Justice Miller declared that

> . . . it must be conceded that there are rights in every free government beyond the control of the state; and a government which recognizes no such rights, but holds the life and liberty and the property of its citizens subject at all times to the absolute and unlimited control of even the most democratic depository of power is, after all, but a despotism of the majority, but none the less a despotism. The theory of government, state and national, is opposed to the deposit of unlimited power anywhere.[2]

Along with the belief in the doctrine of natural rights as the foundation of political authority came the dominant notion of the latter part of the eighteenth century that individual liberties must be preserved.

Among the liberties which were to be protected were the freedom from physical restraint and freedom of speech and of the press. All of these are included in the early declarations of rights and in the first constitutions. Furthermore, provision was made for the liberty of conscience, the right of the individual to his religious faith and to worship as he chooses. This right resulted in the development of the form of religious toleration and the separation of church

[1] For a summary of the influence of the idea of natural rights in the law of the United States, consult article by C. G. Haines on "The Law of Nature in State and Federal Judicial Decisions," *Yale Law Journal* (June, 1917), vol. xxv, p. 617.

[2] Loan Association *vs.* Topeka, 20 Wallace, 655.

and state which has been one of the features of the American commonwealth. The reservation of these rights and their formulation in bills of rights which form a chart and guide to the judiciary constitute a foundation for a concept of civil liberty in which individual rights are rendered, to a considerable extent, free from government regulation and control. Associated with the theory of natural rights was the right of revolution against arbitrary and oppressive government.

Subsidiary to the principle of natural rights and the protection of individual liberty, it was asserted that there should be a government of laws, not of men. According to this dictum, law was to represent the will of the people as formulated in constitutions and statutes, and well-defined regulations by which all of the representatives of the people and officers in charge of the government were to be guided and directed. According to this theory, "ours is a government of, by, and for the people, but the people govern by maintaining the supremacy of laws, sanctioned by public opinion." Furthermore, it was claimed that fundamental and essential rights have been reserved to the people and cannot be taken from them without their consent. In fact, according to this contention, there were certain rights and principles which the government could in no sense invade or interfere with. There was thus instituted a sphere of protection to the individual which forms the American principle of civil liberty—*i.e.*, the protection of the individual from government interference.

The eighteenth-century theory of natural rights, which resulted in our constitutional bill of rights, has likewise been subjected to criticisms and to modifications which affect the primary validity of the theory. So-called natural rights have been attacked from the standpoint that

> . . . a right in any valuable sense can only be that which the law secures to its possessor, by requiring others to respect it, and to abstain from its violation. Rights, then, are the offspring of law; they are

born of legal restraints; by these restraints every man may be protected in their enjoyment within the prescribed limits.[1]

Thus, natural rights are held to have validity and sanction only when they become legal rights, and the term is relegated from the field of law and government to that of ethics. In this manner the theory of natural and inalienable rights as defined in the Declaration of Independence has been refuted. While there is an element of truth in this contention, it is not in accord with numerous decisions in state and Federal courts wherein the doctrine of natural rights has been used as a basis for the protection of the individual from governmental interference.

A more serious criticism is the contention that our bills of rights, inserted in constitutions and interpreted according to eighteenth-century standards, have become barriers to progress in the reform of court procedure and to the development of satisfactory standards in social and industrial legislation. Provisions that were originally intended to protect the individual and that may have been desirable a hundred years ago, such as presentment by grand jury, trial by petty jury, and the hindrance to the giving of testimony in criminal cases, have been so interpreted and applied as to stand in the way of an effective enforcement of the law. Some of these barriers have been removed in recent constitutions. Others are now being subjected to criticisms which will result either in their elimination from the fundamental law or in their modification so as to permit wider latitude to courts and prosecuting officers in the enforcement of the law.

Furthermore, the purpose and function of state constitutions have undergone great changes. The original constitutions were short, establishing merely the three departments and outlining in brief a general plan of government, the details of which were to be filled in later by the

[1] T. M. Cooley, *Principles of Constitutional Law* (Third Edition), (Little, Brown & Co., 1898), p. 247.

legislature, into whose hands the great and controlling powers of government were placed. Among the changes in state constitutions which were introduced in the first few decades of the nineteenth century are: First, constitutions were to be ratified by the electorate. This practice came to be the common one, although in a few instances the constitutions were put into effect without popular sanction. Second, the power of the Governor was strengthened by giving him the veto power and thus extending the principle of the separation of powers. Third, the check and balance idea was introduced through which the position of the Governor was strengthened as against the legislature and under which the courts were regarded as an additional check upon both the legislature and the executive. Fourth, the extension of judicial review—a principle which had been announced in revolutionary times that it was the duty of courts of justice to become the special guardians of the constitution—was gradually developed in the states and was eventually accepted as a general principle of state practice and procedure. The state judiciary became thereby the special protector of the constitution, with authority to prevent infractions of the fundamental law. Fifth, flexibility in the constitution was introduced by the frequent use of amendment and by more general revisions. The constitution also grew in size, particularly by the addition of new subjects, such as the compensation and regulation of officeholders, legislative procedure, and the regulation of banks and education.

But state constitutions have been changed primarily on account of certain correlative developments which have incorporated in constitutions many matters which in 1800 would have found no place in the fundamental law. First, state constitutions have grown because of a developing distrust in legislative bodies. The constitution has become a compendium of limitations on the powers and procedure of the legislative branch. A large part of all state constitutions is now given over to definite limitations upon legisla-

tive powers. Second, new subjects which call for state regulation have been of such significance as to require rather detailed provisions. Among such are education, corporations, elections, and parties. Third, matters which are regarded of fundamental importance to the electorate, such as the initiative, referendum, and recall, are also placed in state constitutions. Fourth, matters, whether fundamental or not, on which the electorate desires to express a judgment are included among the provisions of the constitution. The fundamental provisions establishing a government and defining its powers are thus mingled with ordinary statutory matters. It is not possible to draw a clear line between constitutional law and ordinary law. And as the method of amendment is rendered easier, and the initiative and referendum are used more widely, the dividing line between constitutions and statutes will become even less distinct. Thus the purpose and functions of constitutions will change as community sentiment varies on questions of general public interest.

The new state constitutions are made to serve a double purpose: first, to organize and determine the powers of government, and, second, to serve as an organ of popular will through the enactment of legislation in the constitution itself. In the accomplishment of these purposes the recent state constitutions include many provisions not comprehended within the scope of fundamental law. With the disappearance of a different method of enacting constitutional amendments and ordinary acts and with the growing tendency to include legislative details in the constitution, the former distinction between constitutions and statutes seems to be losing force. And while constitutions are still regarded as instruments for organizing and determining the powers of government, they are becoming likewise an agency for the enactment of laws regarded as important enough to call for general popular approval. The difficulty now is to decide what is so fundamental as to require constitutional sanctity and what should be regulated by

ordinary legislative enactments, as well as to determine the actual purpose and function of a constitution. It is this problem which concerns the states in the modification of their fundamental laws.

The problems, then, of state constitution-making involve the development of a clearer line of demarcation between the scope of constitutional provisions and that of legislative acts, the simplification of the method of amendment so as to retain the fundamental distinction between constitutional law and statutes, and the adoption of more effective methods of securing referendum votes on proposed constitutional changes.

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CHAPTER II

PRINCIPLES AND PROBLEMS OF FEDERAL GOVERNMENT

The Development of Federal Government

The Federal form of government is a comparatively modern kind of political organization. Those who framed the Constitution of the United States had few precedents to guide them. There were leagues of cities in ancient Greece, particularly the Bœotian and the Achæan leagues, with the control of foreign affairs in the hands of a central government. A few leagues of a similar nature were also formed in Italy during the period of Rome's rise and development. The Federal idea, however, did not have as active a growth in Rome as it did in the more free and diverse conditions of Greece. During the middle ages there came into existence various unions of cities, such as the Lombard and Hanseatic Leagues. To compare these ancient leagues with our modern federations it is necessary to define first the distinction between a confederation and a federation.

A confederation is a union of component cities or states in which each one of the units retains its sovereignty and independence. In no case is there any authority outside of the separate divisions to exercise coercion and enforce rights against the individual cities or states. Confederations are usually temporary unions for purposes of defense. There are various degrees of confederation, such as international unions, in which commissions are instituted for the regulation of common interests; monarchical unions, such as that which formerly existed between Austria and Hungary, in which two separate nations are combined under the control of a common ruler; and also outright confedera-

tions, in which a group of states create a common government and delegate to it authority over certain specified affairs. The chief modern instances of instruments forming confederacies were the Articles of Confederation, by which the American states established a common government, each state retaining its sovereignty, and the articles of union among the Swiss cantons which existed prior to the formation of the present federal constitution of Switzerland.

In contrast with the different forms of confederations there is the type known to-day as the Federal form of government. This is a system of political organization in which the separate states retain their authority over internal affairs and grant to one central government the sovereignty and ultimate control over certain specified functions of common interest. The growth of the Federal form of government began in its modern sense with the formation of the Constitution of the United States. Other countries in which the Federal idea has been enacted into the constitutions and laws are the Republic of Argentine, the Dominion of Canada, the United States of Brazil, the Australian Commonwealth, the South African Republic, Switzerland, and the German Empire. In addition, there is a movement among the British Isles toward the federation of the various divisions of England and of the self-governing colonies. Furthermore, in the various plans for international peace and the establishment of leagues to enforce peace, the federation of the world is one of the pervasive ideas of modern times. The Federal form of government as inaugurated under the Constitution of the United States was an experiment, but as an experiment it has met with such success that other nations have adopted the fundamental principles of federalism.

Principles of Federal Government in the United States

Republican Form.—The United States as organized under the Constitution of 1787 has been described as a Federal

republic based on the principle of government by representatives. The nature of this republic was thus defined by James Madison:

> We will define a republic to be a government which derives all its powers directly or indirectly from the great body of the people and is administered by persons holding their offices for a limited period or during good behavior. It is essential to such a government that it be derived from the great body of the people, not from an inconsiderable portion or class of it. It is sufficient for such government that persons administering it be appointed directly or indirectly by the people and that they hold their appointment by either of the tenures specified.

In short, the form of government described by Madison was a democratic republic whose authority was to rest upon the will of the people, but whose functions were to be performed by regularly chosen representatives who were to be subject to constitutional restrictions and requirements.

The Separation of Powers.—Among the theories of government widely accepted at the time of the formation of the Federal Constitution was the theory of separation of powers which formed a feature of the first state constitutions. The general belief was that liberty could be preserved only under a government in which the powers were divided and in which the departments acted as a check one upon the other. Though the members of the federal convention did not attempt to carry out the theory of the separation of powers in its extreme form, and though they permitted the overlapping of functions, such as the granting of certain legislative powers to the President and of some executive powers to Congress, and the control over both executive and Congress by the courts, nevertheless the intention was unquestionably to put into force and effect the fundamental principle of the theory of the separation of powers as commonly accepted at that time. The separation theory has been departed from many times in practice, and has resulted in certain undesirable conditions which have led to adverse criticisms, to which reference has been made in the preceding chapter.

Checks and Balances and the Doctrine of Limited Government.—The makers of the Federal Constitution believed that it was necessary for each department to serve as a check on the others in order that government might not be too strong and that tyranny might not result. There was thus instituted what John Adams defined as "a complication and refinement of balances which is an invention of our own," in which the idea was to set one department against another and to have every officer checked by some other public authority. And, in keeping with the spirit of the times, the founders of the Republic were interested in setting limits to the powers of government as well as instituting a strong central organization. Consequently, some well-defined limits were placed upon those wielding public authority. These limits were generally defined in bills of rights and were intended to protect the individual from arbitrary arrest or imprisonment, to preserve the freedom of religion, freedom of speech, and freedom of the press, and to surround the individual with other protections, including the general proviso that he shall not be deprived of his life, liberty, or property without due process of law, and that lawfully acquired rights shall receive governmental protection. The check and balance idea is a unique feature of the American commonwealth, and it has, on notable occasions, resulted in the paralysis of government functions, particularly when the executive and legislative departments have been under the control of different parties.

The Distribution of Powers.—Another principle of Federal government in the United States is that enumerated powers are granted to the Federal government. Within the scope of the powers granted, the Federal government is supreme, but all remaining powers are retained by the states. The principle clearly stated in the Constitution is to the effect that the Constitution, laws, and treaties of the United States shall be the supreme law of the land. This principle has been taken to support the doctrine that the Federal authority is superior to that of the states and that the

Supreme Court of the United States is the final interpreter of this supremacy. The Supreme Court has uniformly supported the view that no state government can interfere with the exercise of any authority conferred upon the Federal government by the Constitution, nor obstruct its officers, nor in any way interfere with the performance of duties by Federal officers when acting within legal authority. All the powers not expressly or impliedly granted to the Federal government are reserved to the states, which have control over private law, including the criminal law, and the civil law, including contracts and torts, personal and property rights, and domestic relations, as well as all internal affairs. The American states have a wider range of powers than have the states of any other federal system.

The relation between the states and the central government is the greatest problem of federal government. This problem led to the controversy over states' rights in the United States which culminated in the Civil War, when the issue of supremacy was finally determined in favor of Federal authority. In the determination of the relation between state and federal authorities the various federal systems follow different lines of procedure. The national government, both in the United States and in Australia, is granted enumerated powers which are specifically defined in the Constitution, and the reserved powers are left with the states. In Canada, in order to avoid difficulties which led to controversies in other federal systems, the framers of the British North America Act granted much wider powers to the national government. The Canadian federation gives the reserved powers and the right to legislate on general matters to the national government, leaving only specified and enumerated powers for the separate states or provinces. In all of the recent federations more powers are granted to the federal authorities. Australia, for instance, places under national control telephone and telegraph services, banking and insurance, marriage and divorce, invalid and old age pensions, and conciliation and arbitration. Which-

ever plan has been adopted—that of enumerated or that of general powers in the national government—there has been a tendency to extend federal authority and to have the national powers grow at the expense of those of the states. So marked is this tendency that some believe that the federal form of government is merely temporary and that national governments will eventually absorb the powers of the local divisions. This would make the states merely administrative districts, doing away with independent and separate organizations.[1] While there are indications which point to the broadening and strengthening of national powers and the consequent reduction of the functions of the states, there are still many reasons to believe that the federal form of government has proved the best plan yet discovered to secure unity and efficiency in national affairs and to retain a virile and active local self-government. Nevertheless, the adjustment of the relations between central and local authorities remains the chief problem of federal government.

Next in importance to the problem of federal relations are the place and function of the judiciary in relation to the constitution. This consideration of the function to be performed by the judiciary in federal governments involves a discussion of the nature of sovereignty and of the distinction between legislative and judicial supremacy in political affairs.

The Supremacy of the Judiciary.[2]—The concept of sovereignty, whether one and indivisible or whether pluralistic and divided into the numerous groups, cannot be adequately considered here; but the problem of final authority within the competence and jurisdiction of governments requires some attention. From a practical standpoint, the ultimate determination of the rights, duties, and liabilities

[1] *Cf.* A. N. Holcombe, "The States as Agents of the Nation," *The Southwestern Political Science Quarterly*, vol. i, p. 307.

[2] The discussion of the supremacy of the judiciary follows in part the treatment of this topic in the volume by C. G. Haines, *The American Doctrine of Judicial Supremacy* (The Macmillan Company, 1914), pp. 1–17.

of citizens rests with numerous governmental agencies and officers, each of which is vested with certain discretionary powers, and whose acts, within defined limits, are subject to review by some higher authority. Though officers frequently acting within their discretion are not subjected to reversal by superior authorities, especially when a mere mistake in judgment is involved, it is the practice, however, to subject public officers to some form of control when their acts are beyond authority or when fraud, arbitrary or unreasonable treatment, results. Such control in all countries is exercised in a large measure by courts of justice, whose duty it becomes to protect the individual from excess of power by public officers. When, however, the acts are political in character or involve matters comprehended within the fundamental law of the state, the acts of public officers must be judged by the provisions of the constitution. For this purpose, governments may be classified as those with legislative supremacy and those with judicial supremacy.

In the first class are governments such as that of England, where there are no written constitutions. Law is composed of fundamental enactments, customs, conventions, and statutes, all of which are equally subject to change by the supreme legislative department. In England the executive and legislature, under the designation King, Lords, and Commons, combine to legislate and to administer the laws; the judiciary and all other public authorities are bound to obey the mandates of Parliament as the highest power of the state. According to Lord Shaw, the British legislature is supreme and the judiciary is bound. The power which formulates and enacts laws can choose its own road; the power which interprets and applies them follows the path prescribed. "The corrective of the action of Parliament as a human and fallible institution is not a legal corrective, lies not with the judiciary, but lies with Parliament itself, acted upon by a fresh wave of public opinion, a higher sense of duty, a wider range of experience or a

broader perspective in the regions of applied justice." In a distinct and well-defined sense, the English legislature is supreme and the judiciary is subordinate. The judges hold that they cannot act "as regents over what is done by Parliament with the consent of the King, Lords, and Commons." There is in England no written fundamental law and no distinct line of demarcation between constitutional law and statutory law. Although the courts determine the nature and trend of law to a very large extent, it is nevertheless true that the English nation is governed under a legislative supremacy.

In the second class are governments such as that of France, where there are written constitutions organizing the great departments, distributing authority, and defining in a general way the functions of each department. The constitution in a government of this type is intended to be the rule and guide of all public officers, and presumably all governmental activities must be conducted in accordance with the procedure as defined in the fundamental law. But since the French interpretation of the theory of the separation of powers and the function of the judiciary requires that the courts accept as final the acts of the legislature, this department becomes the guardian and final interpreter of the constitution. No French court feels at liberty to disregard an act of the National Assembly. Since the rules prescribed by the constitution will not be enforced by the courts as against the other departments, these rules have been described as fundamental laws which derive whatever strength they possess from being formally written in the constitution and from the resulting support of public opinion. The French "have in general trusted to public sentiment, or at any rate to political considerations, for inducing the legislature to respect the restraints imposed on its authority, and have usually omitted to provide machinery for annulling unconstitutional enactments, or for rendering them of no effect." The Constitution is primarily a rule and guide for the legislative

and executive departments, and strict obedience to its provisions rests with the conscience of the officers of these departments. Although there is a written Constitution with a peculiar sanctity attached to it which can be changed only by a separate and independent authority, and although there is a rather sharp differentiation between the codified public law and ordinary legislation, this public law stands as a guide solely to the legislative department and as a landmark for the electors. Despite the fact that France has a written Constitution which can be amended only by the National Assembly, the country is governed under legislative supremacy. In this class are to be found a great majority of the governments of the world based on the European system of public law.

The third class comprises the Federal and state governments of the United States and the Federal systems of Canada and Australia, and is similar to the preceding group in that there are written constitutions organizing the departments of government, defining their powers, and to a certain degree limiting the field of government activity. The distinguishing characteristic of these governments is the extraordinary power and position of the judiciary. In this type, it is maintained, the people establish in the constitution written limitations upon the legislature; these limitations and the constitutions are superior to any legislative act; it is the function of the judiciary to say what the law is, and, if legislative acts are found to be in conflict with the constitution, to declare such laws invalid. Thus the judiciary, a co-ordinate branch of the government, becomes the particular guardian of the terms of the written constitution. The legislative and executive departments are held within the bounds of authority as understood and interpreted by the judicial power. In governments of this character there is a well-marked distinction between constitutional and statute law. Not only does the written constitution require an extraordinary process for its amendment, but there also develops an elaborate series of

precedents and judicial determinations which, with the sanction of the highest court, have the force and effect of the original provisions of the constitution. The constitution and the rules deduced from it are held to be a paramount law, before which all statutes and public acts that are not in accord with its provisions must give way. The judiciary has the sole right to place an authoritative interpretation upon the fundamental written law. In the United States, supreme power is exercised for most purposes through a judicial system in contradistinction to those governments in which the legislature is supreme and the courts subordinate.

The practice of all departments of government to defer to the courts and abide by their decisions, when in a suit between private parties the majority of justices hold that a statute or executive order is unconstitutional and therefore null and void, is the fundamental characteristic of constitutional law in the United States. To a limited extent the same characteristic is found in Australia and in Canada.

While the majority of countries give to the legislature the real power of constitutional interpretation, and while those which have granted a guardianship of the constitution to the judiciary have narrowed the scope of judicial control, nevertheless there is a tendency to extend the American principle to states now having legislative supremacy.

As a result of the extraordinary power to declare legislative acts invalid, the courts of the United States exercise an influence in the determination of public policy superior to that of the judiciary of any other country. The judiciary wields a great influence in both England and America in the control of government policies and in the determination of the authority of officers. But this power is greatly extended in the United States on account of the principle that laws not in accord with the principles and provisions of the Constitution are held to be invalid by the courts. The courts in the United States, in addition to the ordinary duties of enforcing laws and adjusting controversies, have

the function of defining and holding the balance between the two divisions, the nation and the states. This duty is clearly placed on the courts by the Constitution. It is also universally regarded as the duty of courts to hold legislatures and executives within the bounds defined by constitutions. This authority is not as a rule granted specifically to courts. It was assumed by the judges in the early days of the Republic as a duty, on the theory that democratic government under written constitutions required it. It was agreed that written constitutions were fundamental acts which should be strictly upheld, that the powers of government should be limited and defined, and, finally, that it was a matter for legal determination whether the constitution had been violated. This principle, although almost universally acted upon, has rarely been recognized by statutes or constitutions. On account of the high authority exercised by the courts, the government of the United States has been called an "aristocracy of the robe."

The Development of the Federal Constitution by Decisions of the Supreme Court

It is generally conceded, then, that among all the features of the Constitution of the United States the Supreme Court is the most unusual and its success the most noteworthy. But the Supreme Court was not an important body when the Constitution was formed, and very few cases were brought to the court in the first years of its existence. The state courts were regarded as superior to the Federal courts, and after ten years' service Chief-Justice Jay resigned with the observation that he did not regard the office of sufficient importance to call for the ability of able men. Justices looking for preferment decided to accept positions on the state judiciaries instead of the Federal court. It was not until the accession to the bench of John Marshall and the announcement of the independent position of the court, with the right to declare legislative acts

invalid, in the famous Marbury *vs.* Madison case, that the Supreme Court began to establish its right and position as an independent branch of the Federal government.

With the right asserted to a position independent from that of Congress, it remained for the Supreme Court to establish its power and authority as over against the state judiciaries and to uphold the powers of the Federal government as against state action. This position was maintained in a series of striking precedents delivered by Chief-Justice Marshall and other justices of the Supreme Court in the years from 1810 to 1825. Chief among these precedents are Martin *vs.* Hunter's Lessee and Cohens *vs.* Virginia, in which the Supreme Court resisted the right of final judgment in the state courts and thereby established the doctrine of Federal supremacy in the determination of national constitutional questions. Other precedents of importance are McCulloch *vs.* Maryland, Brown *vs.* Maryland, Dartmouth College *vs.* Woodward, and Gibbon *vs.* Ogden. Each of these cases is a landmark in the development of the Federal government in the United States.

McCulloch vs. Maryland.—In McCulloch *vs.* Maryland, an act passed by the legislature of Maryland to tax the branch of the national bank of the United States was under review. The tax rate was so high as to render it impossible for the bank to do business in the state. In the decision of the court, which is now quoted extensively in all federal governments, particularly in Canada, Australia, and South Africa, as well as in South American countries, Chief-Justice Marshall laid down the following principles:

> This government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent to have required to be enforced by all those arguments which its enlightened friends, while it was pending before the people, found it necessary to urge. That principle is now universally admitted. But the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, as long as our system shall exist. . . .
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> Among the enumerated powers we do not find that of establishing a

bank or creating a corporation. But there is no phrase in the instrument which, like the Articles of Confederation, excludes incidental or implied powers and which requires that everything granted shall be expressly and minutely described. Even the Tenth Amendment, which was framed for the purpose of quieting the excessive jealousies which had been excited, omits the word "expressly," and declares only that the powers "not delegated to the United States, nor prohibited to the states, are reserved to the states or to the people"; thus leaving the question whether the particular power which may become the subject of contest has been delegated to the one government, or prohibited to the other, to depend on a fair construction of the whole instrument. . . .

Although, among the enumerated powers of government, we do not find the word "bank" or "incorporation" we find the great powers to lay and collect taxes, to borrow money, to regulate commerce, to declare and conduct a war, and to raise and support armies and navies. The sword and the purse, all the external relations, and no inconsiderable portion of the industry of the nation, are intrusted to its government. It can never be pretended that these vast powers draw after them others of inferior importance merely because they are inferior. Such an idea can never be advanced. But it may, with great reason, be contended that a government, intrusted with such ample powers, on the due execution of which the happiness and prosperity of the nation so vitally depend, must also be intrusted with ample means for their execution. The power being given, it is the interest of the nation to facilitate its execution. It can never be their interest, and cannot be presumed to have been their intention, to clog and embarrass its execution by withholding the most appropriate means.

Throughout this vast republic, from the St. Croix to the Gulf of Mexico, from the Atlantic to the Pacific, revenue is to be collected and expended, armies are to be marched and supported. The exigencies of the nation may require that the treasure raised in the North should be transported to the South, that raised in the East conveyed to the West, or that this order should be reversed. Is that construction of the Constitution to be preferred which would render these operations difficult, hazardous, and expensive? Can we adopt that construction (unless the words imperiously require it) which would impute to the framers of that instrument, when granting these powers for the public good, the intention of impeding their exercise by withholding a choice of means? If, indeed, such be the mandate of the Constitution, we have only to obey; but that instrument does not profess to enumerate the means by which the powers it confers may be executed; nor does it prohibit the creation of a corporation, if the existence of such a being be essential to the beneficial exercise of those powers. It is, then, the subject of fair inquiry, how far such means may be employed. . . .

We think the sound construction of the Constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional. . . .

If a corporation may be employed indiscriminately with other means to carry into execution the powers of the government no particular reason can be assigned for excluding the use of a bank, if required for its fiscal operations. To use one must be within the discretion of Congress, if it be an appropriate mode of executing the powers of government. That it is a convenient, a useful, and essential instrument in the prosecution of its fiscal operations, is not now a subject of controversy. . . .

Were its necessity less apparent, none can deny its being an appropriate measure; and if it is, the degree of its necessity, as has been very justly observed, is to be discussed in another place. Where the law is not prohibited, and is really calculated to effect any of the objects intrusted to the government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This court disclaims all pretensions to such a power.[1]

The decision in this case indicated that the Federal government proposed to apply the doctrine of implied powers, thus giving to the federal departments authority to carry out such acts and perform such functions as would seem best for the nation, without any express provision in the formal law. Chief-Justice Marshall adopted Hamilton's criterion of constitutionality.

This criterion [said Hamilton] is the end, to which the measure relates as a mean. If the end be clearly comprehended within any of the specified powers, and if the measure have any obvious relation to that end, and is not forbidden by any particular provision of the constitution, it may safely be deemed to come within the compass of the national authority.[2]

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[1] 4 Wheaton 316, at 405–421.

[2] Hamilton's *Works* (Edition 1851), vol. iv, pp. 104 ff.

Once the end is clearly comprehended within the fundamental law, then it is contended that any means which may be needful, requisite, incidental, or useful may be regarded as fully authorized. The decision in McCulloch *vs.* Maryland also provided for the principle, which has been consistently upheld in the United States, that there are two distinct governmental entities, Federal government and the state governments, that each must be protected from interference by the other, and that any effort to tax the instrumentalities of one of these entities by the other must be declared null and void. This doctrine, which is known under the name of "implied prohibitions," has come to be regarded as one of the fundamental principles of Federal government in the United States and has rendered it impossible for the state governments to tax Federal officials and instrumentalities or for the Federal government to tax state officials and instrumentalities.

Brown vs. Maryland.[1]—When the state of Maryland attempted to place a tax upon articles imported into the state in such a way as to prevent the free access of products and their entrance into the state for commercial purposes, again the Chief Justice laid down the principle that as to the control of commerce, the Federal Constitution requires that no state shall be in a position to prohibit free access of articles and goods into a state. As a consequence, the state cannot legislate with regard to the commerce until an article has entered the state, has been opened from the original package, and has become identified with the ordinary goods and products of the state. This principle has come to be regarded as "the original package principle," and has had a great influence upon the attempts of the states to regulate and control interstate commerce. The original-package case has occasioned a great many difficulties; and while it has resulted in freeing commercial dealings as between the states, it has created some serious obstacles which have had to be removed by congressional

[1] 12 Wheaton 419.

acts and by subsequent court decisions. The principle remains, nevertheless, as one of the tenets of American federalism—namely, that no state can control interstate commerce until articles have entered the state and have been mingled with the general property of the state.

Dartmouth College vs. Woodward.[1]—One of the most important decisions of the Supreme Court dealt with the question as to whether a private corporation when it had secured a charter from a state was protected under the form of that charter by the section of the Constitution providing that no state shall impair the obligation of contracts. The Supreme Court, in a notable opinion asserted the doctrine that when a charter is granted by a state the charter becomes a contract and the terms of the contract cannot be changed by a subsequent act of the legislature, unless an express provision for such change is included in the charter itself. The effect of this decision was to take from the states the control of private corporations, particularly corporations which had secured long-term charters or perpetual franchises, and which could then claim the protection of the Supreme Court from any interference by state legislation. This decision has rendered extremely difficult the regulation by the state of corporate franchises, and was the beginning of a long line of Supreme Court decisions protecting property interests and vested rights.

Gibbons vs. Ogden.[2]—In the case of Gibbons *vs.* Ogden the Supreme Court was called upon to decide the meaning of the term commerce—*i.e.*, whether commerce was intended to cover intercourse between states and the extent to which Congress has the right to regulate such commerce. A New York statute had granted to Livingston and Fulton the exclusive right to navigate the waters of the state by steamboat for a period of years. This right was contested as an interference with the constitutional powers of Congress over interstate commerce. Commerce was defined by the court to include commercial intercourse, and navigation

[1] 4 Wheaton 518. [2] 9 Wheaton 1.

and the exclusive right granted by the state was declared void. The doctrine of liberal construction was again defended by Marshall as follows:

> This instrument [the Constitution] contains an enumeration of the powers expressly granted by the people to their government. It has been said that these powers ought to be construed strictly. But why ought they to be so construed? Is there one sentence in the Constitution which gives countenance to this rule? In the last of the enumerated powers, that which grants, expressly, the means for carrying all others into execution, Congress is authorized "to make all laws which shall be necessary and proper" for the purpose. But this limitation on the means which may be used is not extended to the powers which are conferred; nor is there one sentence in the Constitution which has been pointed out by the gentlemen of the bar, or which we have been able to discern, that prescribes this rule. We do not, therefore, think ourselves justified in adopting it. What do gentlemen mean by strict construction? If they contend only against that enlarged construction which would extend words beyond their natural and obvious import, we might question the application of the term, but should not controvert the principle. If they contend for that narrow construction which, in support of some theory not found in the Constitution, would deny to the government those powers which the words of the grant, as usually understood, import, and which are consistent with the general views and objects of that instrument—for that narrow construction which would cripple the government and render it unequal to the objects for which it is declared to be instituted, and to which the powers given, as fairly understood, render it competent—then we cannot perceive the propriety of this strict construction, nor adopt it as the rule by which the Constitution is to be expounded. As men whose intentions require no concealment generally employ the words which most directly and aptly express the ideas which they intend to convey, the enlightened patriots who framed our Constitution and the people who adopted it must be understood to have employed words in their natural sense, and to have intended what they have said. If, from the imperfections of human language, there should be serious doubts respecting the extent of any given power, it is a well-settled rule that the objects for which it was given, especially when those objects are expressed in the instrument itself, should have great influence in the construction.[1]

By the time this decision was rendered the Supreme Court had asserted its authority as superior to and independent

[1] 9 Wheaton 1, at 187–188.

of Congress with the right to declare acts of Congress invalid when regarded as contrary to the Constitution. It had also pronounced and effectively maintained the right to set aside the laws of the states when those laws were regarded in conflict with some Federal provision. More important still were the announcement and successful defense of the principle of implied powers. Though the cases in which the Supreme Court has interfered with the will of Congress are relatively few, the number of state statutes set aside by the court has been large, and an effective supervision has been exercised over state legislation affecting taxation, commerce, and business, and such acts as arbitrarily interfere with rights of person or property.

Within recent years, an extraordinary development of the authority of the Supreme Court has come through the extension of the clause of the Fourteenth Amendment relating to due process of law and the equal protection of the laws. This clause, although originally interpreted strictly by the Supreme Court as intended to apply to the protection of the negro race, was gradually extended to include the protection of all citizens and corporations from any unjust or oppressive act which interfered with life, liberty, or property. The amendment has thus come to be a device by which the court maintains a censorship over state governments as to the justice, fairness, and equity of state legislative acts.

Expansion of Federal Powers by Congressional Legislation and a Subsidy System.—Finally, Congress and the Supreme Court have given, under the commerce clause, an impetus to the growth of nationalism. Commerce, originally interpreted to apply merely to navigable waters over which Congress might legislate, has been extended to the control of the sources of these waters, particularly as affected by irrigation, and to the preservation of forests. The term has also been extended to include a prohibition of the manufacture and sale of certain articles, such as lottery tickets and articles produced by child labor. By the passage of the

Interstate Commerce Act, the Sherman Anti-Trust Act, and the recent Federal Trade Commission Act, along with the decisions of the Supreme Court supporting control of commerce, commercial relations in the United States are in the process of being placed gradually under the Federal government. It seems to be merely a matter of time until the United States will be in a position to establish complete and uniform commercial regulations affecting all business and individuals engaged in commercial transactions involving more than one state. According to the theory of such men as President Roosevelt and Senator Root, the United States Constitution should be expanded through legislation and interpretation as the needs of time demand, and those things should be nationalized in which national control seems necessary. At any rate, it has been determined by continued practice that the Constitution may grow and expand without formal amendment, and that Federal powers may be extended by the process of interpretation to include Federal regulation of matters formerly belonging to the states.

In addition to the Federal laws which center primarily around commerce and business relations among the states, the power of the national government has been strengthened and extended by the passage of acts relative to subjects foreign to action by Congress a decade or two ago. The Federal government, with the exception of time of war, formerly raised its money through tariff and internal duties, but the enactment of the income tax and inheritance tax acts broadened the power of the national government to raise revenue. The control of food and drugs, at one time considered a matter of local control, if not entirely an individual matter, passed to a certain extent into the hands of the central government when the Federal Food and Drug Act, as well as the Meat Inspection Act, went into effect. The Bank Act of 1863, the Federal Reserve Act of 1913 and the Postal Savings Bank Act of 1910, together with the Farm Loan Act of 1916, have resulted in placing the Federal government in control of an extended banking business.

Another type of national legislation is that which aims, by granting subsidies or by rendering other assistance, to stimulate action on the part of the states in handling affairs which heretofore have been regarded only of local concern. Examples of such acts are the Morrill Acts which provide for Agricultural Education and the Vocational Education Acts, as well as the Federal Good Roads and Public Health Acts. The acts which provide for subsidies affect the relation between the nation and the states to a greater extent than is likely to be the case in Federal legislation, which offers no financial aid. Subsidies carry with them requirements and obligations on the part of the state, which accepts assistance while the administration of the particular activity is usually placed, to a certain degree, at least, under the control of the nation. The acts to which reference is here made are examples of national legislation, which within the last few decades and especially the last decade have deviated from the course originally prescribed by the Constitution. They serve to show the general tendency of the national government to extend its power and to cut across powers formerly exercised by the states.[1]

Uniformity in State Laws

One of the chief difficulties which confront all federal systems of government is the diversity in laws and their administration, resulting from the fact that many matters of general concern are dealt with by numerous legislatures, courts, and administrative bodies. To obviate this difficulty some federal constitutions grant to the national government the authority to establish uniform codes of laws covering the fundamental relations of general interest. In the United States, where important powers are reserved to the states for the regulation and control of the primary interests of life,

[1] J. A. Lapp, *Important Federal Laws* (B. F. Bowen & Co., 1917); Paul H. Douglas, "A System of Federal Grants-in-Aid," *Political Science Quarterly*, no. 2, pp. 255–271, and no. 4, pp. 522–544.

such as the legal relations arising out of contracts, property, torts, crimes, domestic relations, and corporations, many conflicts continually arise and commercial dealings are hampered by a variety of regulations. This condition would have become intolerable were it not that all but one of the states of the United States adopted the common law and thereby developed a practice of securing a considerable degree of uniformity by deliberately adopting the same laws and by the courts of one state following those of another in interpreting similar common law and statutory provisions. Owing to this practice, constitutions and statutes show evidence of continuous copying until a provision with only slight modifications is incorporated into the law of all of the states. Again the courts in the application and interpretation of statutes have more frequently made it a practice to follow precedents and thus to be guided by court decisions in other states. Thus, states like Massachusetts, New York, and New Jersey, through competent and capable justices, have rendered decisions which have guided the highest courts in other states of the Union. While these tendencies have been largely responsible for such uniformity as prevails in the law of the several states, there have been some deliberate attempts to secure uniformity. For example, efforts have been made to frame model statutes suitable for adoption in any state on such matters as civil service, workmen's compensation, and public-utility regulation. But the most noteworthy attempt in this direction has been inaugurated through the Commissioners on Uniform State Laws authorized by the American Bar Association and national conferences on uniform laws held by this body. As a result of the efforts of these commissioners, a group of important model statutes have been drafted.

The first act drafted by the commission was an Acknowledgments of Written Instruments Act in 1892.[1] This

[1] The data with regard to uniform acts and the legislation adopting same are based upon the volume prepared by Charles Thaddeus Terry on *Uniform State Laws in the United States* (Baker, Voorhis & Co., 1920).

act has not been accepted by the state legislatures. About the same time there was drafted an Act Relating to Wills Executed Without the State. This act was adopted by five states and by Alaska. One of the most important acts from the standpoint of uniformity of state laws was the preparation in 1890 by the commissioners of a Negotiable Instruments Act. Fifty jurisdictions, including states, territories, and insular possessions, have adopted this act. In 1906 a Uniform Sales Act was prepared. This act has since been adopted in eighteen states and Alaska. At the same time, the commissioners submitted a Warehouse Receipts Act which has since been enacted into law in forty-two states. An effort to secure a Uniform Annulment of Marriage and Divorce Act has not been so favorably received by the states, but has tended to secure a beginning toward uniformity. A Uniform Bills of Lading Act completed in 1909 has been adopted in about twenty states. Other acts which have been prepared and adopted by some of the states relate to Stock Transfers, Child Labor, Marriages and Marriage Licenses, Partnerships, Foreign Acknowledgments, Limited Partnerships, Conditional Sales, and Fraudulent Conveyances. Drafts have also been prepared for a group of acts which the state legislatures have not yet accepted, as follows: Desertion and Nonsupport, Cold Storage, Workmen's Compensation, Probate of Foreign Wills, and Land Registration, the last named being an adaptation of the Torrens System.[1]

Despite all of the efforts to secure uniformity of laws among the several states marked diversities still prevail in certain branches of the law. In many instances differences in conditions warrant the application of diverse rules but in others the differences result in serious conflicts which the Federal courts must adjust. The intermingling of the affairs of one state with those of another in commerce,

[1] For the texts of these acts, with other valuable information, consult C. T. Terry, *Uniform State Laws*.

finance, travel, and a multitude of business dealings seems to require either more extensive uniformity through Federal laws or through the adoption of uniform acts by the states.

Some Comparisons with Federal Government in Canada, Australia, and Switzerland

Canada.—Some of the important principles of federal government may be illustrated by comparisons with the government of Canada. The framers of the Canadian federation followed a different plan of procedure from that of the United States in certain respects. In the first place, all legislative powers are distributed between the Federal Parliament on the one hand and the provincial legislatures on the other. The British North America Act does not contain a series of limitations on legislative power such as is ordinarily comprised within the bills of rights of American constitutions. There is no realm of protection to the individual or to property interests, which constitutes the scope of civil liberty in America. This characteristic is referred to as the omnipotence of Canadian legislatures within their respective spheres, and is frequently commended as one of the best features of the Canadian government.[1]

A second feature which distinguishes the Constitution of the Dominion from that of the United States is the possession by the federal government of the veto power over provincial legislation. By virtue of Sections 56 and 90 of the Canadian Constitution, a copy of every provincial act must be sent to the Governor-General, who may within two years after the receipt thereof disallow the act. This device was intended as a check to the abuse of provincial authority, and was regarded as a method of protecting the individual against unjust interference with vested rights. The veto power is now seldom exercised.

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[1] *Cf.* C. G. Haines, "Judicial Review of Legislation in Canada," *Harvard Law Review* (April, 1915), vol. xxviii, p. 565, from which this account is condensed.

Third among the salient features of the Canadian federal system is the provision that powers not specifically granted to the provinces are reserved to the Dominion. The provinces have no lawmaking powers except those expressly given them by the British North America Act. In Canada, therefore, not only has the Dominion government power to veto directly the legislative acts of the provinces, but the Federal government is also the residuary legatee of all powers not specifically granted to the provinces. On this matter a principle was adopted just the reverse of that incorporated in the fundamental law of the United States, wherein it was enacted that all powers not granted to the Federal government were reserved to the states. Canada has thus avoided the necessity of expanding her Federal authority by means of an implied-power doctrine and the practice of progressive adaptation by the judiciary of general provisions which must be modified to meet new conditions. The courts of Canada have been saved from the heavy burden placed upon that department in the United States.

The residuary power whereby the Federal government is authorized to make laws for the peace, order, and good government of Canada constitutes the fourth leading principle of the Dominion Constitution. By means of this principle it was intended to remedy what was deemed "the capital defect of the American Constitution where the preservation of law and order is not summarily and directly the affair of the government of the United States." The responsibility of maintaining public order throughout the entire country is thus placed directly upon the central government.

The combined effect of these principles—no bill of rights with sphere reserved from governmental regulation; Federal veto over provincial acts; provision that powers not specifically granted to the provinces are reserved to the Dominion; residuary authority in the Federal government to make laws for the peace, order, and good government of

Canada—is to render the Federal government of Canada quite different in practical operation from that of the United States. Furthermore, the parliamentary system of England has been followed as a model in the organization of the Dominion and provincial governments. Canadian legislatures, guided by their cabinets, have greater powers than American legislatures.

Australia.—The Constitution of Australia establishes a federal form of government with a combination of American and Canadian features.[1] A government of limited and enumerated powers was established, with the parliaments of the states retaining the residuary powers of government. In this respect, the American, rather than the Canadian, plan is followed. There is no general supervision of the state in the exercise of the powers belonging to it as is enjoyed by the Dominion government over the provinces of Canada. Declarations of individual right and the protection of liberty and property against the government, such as exist in the United States, are conspicuously absent from the Constitution; the individual is deemed sufficiently protected by that share in the government which the Constitution insures him. The theory of the separation of powers after the model of the United States was adopted, but with certain well-understood limitations and modifications.

There is no doubt but that it was intended by Australian statesmen to establish legal limitations on the organs of government, and that it devolves upon the courts to define these limitations. But attention is called to the fact that the greater number of cases in American courts which refer to the separation of powers have been decided not on the implied prohibition arising from the separation of powers, but upon express restraints imposed on the legislature, such as the prohibition of bills of attainder or *ex post facto* laws and the prohibition against the state legislatures as

[1] *Cf.* C. G. Haines, "Judicial Review of Legislation in Australia," *Harvard Law Review* (April, 1916), vol. xxx, p. 595.

to laws impairing the obligation of contracts or the deprival of due process of law. Special care must therefore be taken, say the Australian authorities, in the application of American precedents on this subject to a Constitution where these additional restrictions do not exist.

In the distribution of powers, the Australian Constitution is more specific than the Constitution of the United States. There are matters:

1. Exclusively Federal, such as the location of the seat of government and the public property of the commonwealth;
2. Over which the power of the Commonwealth Parliament operates by way of paramount legislation merely, overriding any exercise by the state of its own power. This division includes such powers as are expressly granted to the commonwealth but concerning which Federal legislation is not adequate or exhaustive;
3. Over which the Parliament of the Commonwealth, and the parliaments of the states have concurrent and independent jurisdiction, such as taxation.

On a few subjects the procedure is direct from the states to the Colonial Office in England; consequently, these matters are not within Federal jurisdiction. The most important are:

1. Allowance and disallowance of state legislation.
2. Appointment and removal of state governors.
3. Amendment of state constitutions.

The establishment of judicial review in the High Court as to Federal constitutional questions is the most striking feature of the Australian Constitution. On this point the citizens of Australia decided to follow the American model; and despite the determined opposition of the home government, they have persistently maintained the right to have the final interpretation of the Australian Constitution vested in the judges of the High Court. With no elaborate bill of rights containing numerous reservations of government powers, and with no general clauses like "due process of law" to guide the courts, the judges of Australia will

have much less opportunity than the judges of the United States to pass upon the validity of legislative acts.

Citizens of the United States may find much of interest in the government of these self-governing colonies. Owing to the fact that the problems of government are quite similar in Canada and Australia, and that these countries have profited by the advantages as well as the disadvantages of the American federal system, comparisons with our own government are especially interesting.

Switzerland.—A constitution which is of peculiar interest to citizens of the United States and one which exhibits some marked contrasts with the American federal system is that in operation in the republic of Switzerland.

The Swiss Constitution is a longer document than the Constitution of the United States largely because the powers of the Federal government are defined in greater detail and the division of powers between nation and states is more explicitly stated. For this reason

> . . . such controversies, constitutional, political, and economic, as have raged about these subjects in our country would be impossible in Switzerland. Americans are accustomed to make a great deal of the distinction between "express" and "implied" powers. Of the Swiss Constitution it may be said that much of the power it confers is expressed, and correspondingly less implied, than is the case with the Constitution of the United States.[1]

Considerable power has been conferred upon the Federal government in the provision that "in case of difference arising between cantons, the states shall abstain from violence and from arming themselves; they shall submit to the decisions, to be taken upon such differences by the federation."[2] The satisfactory settlement of eleven controversies involving internal disturbance and conflicts between cantons has demonstrated the efficacy of this provision and has shown Federal intervention to be more

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[1] R. C. Brooks, *Government and Politics of Switzerland* (World Book Company, 1918), pp. 48–49.

[2] Article 14.

successful in Switzerland than has been the case in the United States.

One of the marked differences between the American and Swiss federal systems is found in the distribution of administrative functions.

Though it is true that certain functions are wholly federal and others belong entirely to the cantons, the general principle which prevails in the United States and which draws a sharp line of demarcation between Federal functions executed by Federal officials and state functions executed by state officials, does not exist in Switzerland. Instead are found, in the words of Professor Brooks, "many curious and involved combinations of Federal and cantonal action."[1] Examples of this interlocking of Federal and cantonal functions are shown in the slight control which the canton still exercises over the army, in the minor power retained by them over treaties, and in the selection of certain advisory officials of the Federal railways by the cantons. In addition, the administration of certain Federal legislation, such as that which relates to hydraulic power, and to standards of weights and measures, is left largely to the cantons under Federal supervision. The Federal government may also grant subsidies to cantons for primary education and for public works, although both belong under the jurisdiction of the cantons. In the matter of taxes the military exemption tax is collected by the cantons; one half of the gross proceeds, however, is paid to the federation. But the profits derived from the alcohol monopoly, as well as some other profits and revenues administered by federal officials, are divided among the cantons.[2]

Notwithstanding the functions which the Federal government shares with the cantons, there are many administrative powers which are exercised exclusively by the former. And these powers have been augmented by the recent

[1] R. C. Brooks, *Government and Politics of Switzerland* (World Book Company, 1918), p. 59.
[2] R. C. Brooks, *op. cit.*, p. 59.

tendency on the part of the Federal government to enter into the fields of business projects and by the enactment of social insurance laws. But the centralization of administrative powers in the federal government has been accomplished largely through the compromises made to the cantons in the way of sharing the profits or in the process of administration. Centralization in Switzerland has succeeded, says Professor Brooks, "by adroitly throwing a sop to the states' right element."

The Constitution of Switzerland also places greater legislative power in the Federal government than does the Constitution of the United States. Among these powers are legal jurisdiction over criminal and civil affairs, the right to impose export as well as import duties, the control of the construction and operation of railroads and unrestricted jurisdiction over commerce. Furthermore, the legislative power of the central government is extended over Federal monopolies such as telegraph, telephone, railroads, gunpowder, alcohol, and includes the subsidizing of institutions of higher education.

The intertwining of the administrative functions of the federation and the cantons indicates a practice of cooperation which, in some of its features, is worthy of careful study in the United States, where separate officials are necessary for the administration of Federal, state, and local functions.

A significant practice in the method of procedure in the Swiss legislative chambers is that, although members have the right to introduce bills, they rarely exercise this privilege. It is customary for a member who desires to introduce a measure to present a motion requesting the executive council to prepare a report and to draft a bill comprising the features of the desired enactment. When such a resolution meets the approval of both houses the executive department is expected to submit to the legislature a bill carefully drafted. Professor Brooks maintains that there are manifest advantages in this practice for:

It is seldom that members of legislative bodies, either in Switzerland or elsewhere, are competent to draft legislation satisfactorily. By the Swiss system every bill is drafted by an expert authority, familiar not only with legal forms and constitutional limitations, but also with administrative experience in the fields affected by the measure. Legislators are set free from tasks for which they are not qualified and enabled to devote more time to the discussion of the broad general principles involved in bills and to the expression of local points of view thereon. Nor does there seem to be any fear on the part of the Swiss that the executive will take advantage of this situation by making its point of view prevail unduly as against that of the legislature. For the Federal Council is not only under the general control of the legislature, but must also appear before the two houses of the legislature to explain and defend the bill it has drafted. Moreover, each branch of the legislature may reject the bill altogether or return it to the Federal Council with a recommendation that it be amended.[1]

As is the case in the United States, "the cantons are sovereign so far as their sovereignty is not limited by the Federal Constitution; and, as such, they exercise all the rights which are not delegated to the Federal government,"[2] and as a consequence the Federal government is restricted to delegated powers.

Furthermore, by the Constitution, "the federation guarantees to the cantons their territory, their sovereignty, within the limits fixed by Article 3, their constitutions, the liberty and the rights of the people, the constitutional rights of citizens, and the rights and powers which the people have conferred on those in authority."[3]

Additional characteristics of democracy in Switzerland have been described previously in connection with the initiative and referendum. It is significant that the fateful decision as to whether Switzerland should become a member of the League of Nations which was passed upon by

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[1] This and the foregoing extracts from *Government and Politics of Switzerland*, by R. C. Brooks (copyright, 1918, by World Book Company, Yonkers-on-Hudson, New York), are used by permission of the publishers. *Cf.*, pp. 57–61.

[2] W. F. Dodd, *Modern Constitutions* (University of Chicago Press, 1909), vol. ii, p. 257.

[3] Article 5.

representatives in all other countries was submitted to a referendum for determination by the Swiss voters.

Problems of Federal Government

Notwithstanding the success with which the federal system of government has met in such countries as the United States, Switzerland, Canada, Australia, and certain South American countries it is still a problem whether federalism is a permanent or a temporary form of government. The tendency in all federal systems for the central authorities to gain powers and to extend their jurisdiction at the expense of the states appears to bear out the contention that federal government tends toward unitary government. In this respect the states become more in the nature of administrative districts and less of independent and autonomous government units. It has been well said that

> . . . the phase of sentiment, in short, which forms a necessary condition for the formation of a federal state is that the people of the proposed state should wish to form for many purposes a single nation, yet should not wish to surrender the individual existence of each man's state or canton.[1]

But the political and economic conditions which formerly tended to separatism and states' rights have been profoundly modified by modern industrial developments. The interests of separate states are becoming so intertwined with the welfare of other states that the sentiment of nationalism practically everywhere gains a dominant interest. This does not mean, however, that federalism need disappear. In fact, the extraordinary growth of government functions makes it necessary to maintain and foster the active participation of local units in political affairs.

According to Professor Dicey the three leading characteristics of federalism are:

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[1] A. V. Dicey, "Federal Government," *Law Quarterly Review*, vol. i, p. 81.

1. The supremacy of the constitution.
2. The distribution among bodies with limited and co-ordinate authority of the different powers of government.
3. The authority of the law courts to act as interpreters of the constitution.[1]

In amplification of these characteristics it is contended that federal government requires something in the nature of a formal written constitution which stands above ordinary law and serves to delimit the relative spheres of the nation and the states. The more clear and explicit this delimitation is made, the less likely that serious controversies will arise which may interfere with the stability of the federal regime. Other federal governments have profited by the defect of the American system in this respect and more care has been exercised in the definite distribution of governmental functions.

The third characteristic, the authority of the courts to act as interpreters of the constitution, is not an invariable requirement of federal government. American courts have greater authority in this respect than those of other federal systems, although the courts of Australia and Canada are charged with the duty of keeping watch that the limits prescribed by the Constitution are preserved. The Swiss people after a careful review of American experience discarded the judicial prerogative to expound the Constitution in favor of interpretation by the legislature.[2]

No such power to act as interpreters was lodged in the courts in the Federal government of the German Empire. And only a very limited authority of this kind is vested in the courts of the Argentine Federation. Though federalism requires something in the nature of a written instrument in which the spheres of governmental functions are carefully delimited, the upholding of the Constitution and the preser-

[1] A. V. Dicey, "Federal Government," *Law Quarterly Review*, vol. i, pp. 82 ff.

[2] See Constitution, Article 113.

Defend or criticize the American plan of judicial determination of the sphere of powers of nation and states.

vation of these limits may be placed in the hands either of the judiciary or of the legislature.

The chief problems of federal government are, then:

How can the balance between federal and state powers be maintained?

Will the central governments gradually extend their powers and functions and consequently curtail the powers of the states composing the federation until such states are little more than administrative districts?

Where should the final authority to interpret constitutions and laws under the federal form of government rest?

Can the federal form of government be applied to the organization for the settlement of international disputes and the determination of matters relative thereto?

Are the principles of democracy and federalism compatible with a strongly centralized government?

Prepare an answer to the above questions in the light of American experience.

SUPPLEMENTARY READINGS

See references to preceding chapter and the following authors:

EDWARD PORRITT, *Evolution of the Dominion of Canada*, especially Chaps. VIII–XIII (World Book Company, 1918).

ROBERT C. BROOKS, *Government and Politics of Switzerland*, especially Chaps. III–VII (World Book Company, 1918).

ARTHUR P. POLEY, *The Federal Systems of the United States and the British Empire* (Little, Brown & Co., 1913).

A condensed description of the salient features of the federal systems of the United States, Canada, and Australia, with some interesting comparisons and observations on the working of federal government.

CHAPTER III

PARLIAMENTARY *VERSUS* PRESIDENTIAL SYSTEMS OF GOVERNMENT

The relation of the executive, with its divisions and departments, to the representative assembly constitutes one of the greatest problems of modern democratic governments. In order to appreciate and understand the difficulties involved in the organization of the legislative and executive departments in their relation to one another, it is necessary to describe in detail the essential features of the two leading forms of representative and democratic government. The one form, the parliamentary system, is exemplified in England, Canada, Australia, and South Africa; the other form, the presidential system, is found in the United States and in a number of the South American countries. Each of these forms has certain principles which can be clearly understood only by means of comparison. As the tendency in democratic countries has been in the direction of parliamentary government, it seems desirable to present first the features and principles of this form. By so doing, not only the presidential system of the United States is rendered more intelligible, but also certain recent changes and modifications are explained. Parliamentary government is the forerunner and prototype from which other forms of democratic government have developed.

The Parliamentary System of Government in England

Parliamentary government had its origin in the long contest in England between the king and the representatives of the nobility and of the landed estates. These representa-

tives, with the higher nobility in the House of Lords and the lesser nobles in the Commons, as defenders of the rights of the people, set an effective check upon the exercise of the royal prerogatives by the king. Under the leadership of a few strong Ministers who had the support of the nation, the rights of the monarch were gradually reduced, the participation of the people in the government was extended, and the cabinet or parliamentary system was evolved. Parliamentary government in England is conditioned by the customs, conventions, and understandings which are commonly referred to as the English Constitution, and which, as has been stated, are not embodied in a single written document. The English Constitution is nothing more than a convenient name for those acts, customs, and conventions by which, for the time being, the various departments of government are guided. In theory the government of England is the rule of King, Lords, and Commons, and acts are not regarded as binding unless all three of the powers combine in sanctioning them. Exceptions to this are money bills, which no longer require the assent of the House of Lords, and other bills which may become laws without the Lords' consent, provided they are passed by the House of Commons in three successive sessions. Moreover, the king has ceased to exercise the veto power, and participates only indirectly in legislation by advice and counsel before laws are enacted by Lords and Commons. The practices and conventions which have come to be known as the parliamentary system may be thus briefly summarized.

Legislative and Executive Departments Are Combined.— The Cabinet is at the head of the government and is the director of the affairs of the King, Lords, and Commons. The Prime Minister is the real executive. All acts of the king must be countersigned by a Minister, the Minister becoming responsible for the act. The ultimate responsibility rests with the Prime Minister and the entire cabinet. Cabinet members as department heads have extensive

functions. For this purpose, each Cabinet member must have a seat in parliament and it is his duty,

1. To direct one of the great departments of government as an executive and administrative officer.
2. To participate in legislation by preparing bills and supporting them before the Cabinet and in Parliament, and in general to guide legislation within his province.
3. As a confidential adviser of the Crown, to help formulate national policies, and as a member of the cabinet to uphold the government.

All of these functions are performed under the direct guidance, criticism, and control of the House of Commons. "It is a cardinal axiom of the modern British Constitution," said Gladstone, "that the House of Commons is the greatest of the powers of the state."

The Cabinet a Directing Committee for the Majority Party.—The Prime Minister and the Cabinet lead the majority party and for the time being run the government in accordance with the principles for which the majority party stands. The minority is known as the Opposition. All of the acts of the government are looked upon as acts of a party, which is responsible to the House of Commons, the House in turn being responsible to the electors of the nation. So long as the majority retains the confidence of its supporters, the Prime Minister and the Cabinet may continue in power. A dissolution of Parliament may be caused by a vote of lack of confidence, in which case the Cabinet may resign and turn the government over to the Opposition or may ask for a dissolution and a general election to determine whether the nation will support the Cabinet. The party sustained by the vote of the people takes charge of the government.

There is, then, in England the practical supremacy of the House of Commons, with the Cabinet as the directing committee and with the legislative and executive powers concentrated in the hands of Parliament and the Ministry. The organization and procedure of the House of Commons, the most ancient and most important of the legislative

bodies, differ materially from those of most legislative assemblies. In the first place, the assembly conducts its work in large part through the Cabinet as the directive committee, and hence it is not split up into subcommittees to such an extent as is the custom in most legislatures. There are some committees, to be sure, such as the committee on selection of officers and committees which deal with private bills, but the greater part of the business of the House of Commons is considered and enacted in the committee of the whole, which means the entire House, with the result that public business is conducted largely under the direction of the Cabinet with the assent of the chamber.

The business of the House of Commons is greatly facilitated by the distinction made between public bills and private bills, for which there are differences in methods of procedure. Public and private bills are enacted by apparently the same procedure, but certain restrictions render the progress of private bills rather difficult and subordinate their consideration to that of public affairs. The chief restrictions are that these bills must originate in petitions and that they must be submitted in advance of the opening of the session. The progress of private bills is determined by stringent regulations, and fees are required from proponents and opponents. The most important legislation of a public nature originates with the Ministers and is entirely in their charge. Private members may bring public bills before the House, provided they are afforded a chance by the Cabinet to do so. In the meager allowance of time at their disposal, there is not much opportunity to urge the cause of private measures.

The control over the Cabinet by the House of Commons is in the form of questions, criticisms, and occasionally a vote of censure. In the main, the Cabinet conducts the executive and legislative business of the British Empire, subject to the public scrutiny of members of the House of Commons who bring to the light of public opinion the grave

matters of public interest involved in legislative and administrative procedure.

The Cabinet Acts in the Name of King.—No part of the English government is more difficult for the American to understand than the English Crown. While the government has grown more and more democratic, becoming increasingly responsive to public will, the monarchy has increased in popular esteem. There are certain characteristics which belong to the English king which condition his power and position. In the first place, the nation has adhered to the early theory, established at the time when the king was both ruler and sovereign, that the king can do no wrong. To carry out this theory and apply it in a government which was becoming democratic in practice, it was necessary to provide that a Minister should become responsible for every official act. The result is that the king of England cannot move in an official way, cannot make an appointment or issue an executive order to participate in any act of government, without the assent of a Minister, who thereby becomes sponsor for the act and thus binds his associates, rendering the Cabinet responsible and through the cabinet, the House of Commons.

The name of the king is not brought into public controversies. He stands as an executive head above party lines. Within and behind the party, conditions are constantly arising which call into exercise royal advice and discretion. It is regarded as the function of the king to consult, to advise, and to warn. What part the king of England plays in this process is largely a matter of mystery, for in no way may his power and influence be publicly announced. There is no question but that he quietly and unobtrusively plays a much more prominent part in public affairs than the information which we possess would lead us to believe. Though in theory the prerogatives of the Crown include the right to participate in legislation, to make ordinances which have the force of law, to appoint a considerable number of officials and dignitaries, to act as head of the Es-

tablished Church and of the army and navy, to "represent the Empire in all external relations and in all dealings with foreign powers, to declare war, make peace, and conclude treaties," nevertheless, none of these acts can now be performed except through a Minister, who thereby assumes responsibility for himself, his colleagues, and the government.

The most significant feature of the English Crown is that it is an institution which stands as a symbol of unity and an object of patriotic sentiment. All of the acts of the state issue through the name and under the authority of His Majesty. Loyalty to the king's person as concentrating and embodying the essential unity and purpose of the government is one of the great characteristics not only of English public opinion, but also of the self-governing colonies and of the outlying territories and dependencies under the British dominion. The kingship has been a strong factor in binding the different parts of the Empire. The Canadians and Australians are intensely loyal. The former not only support the English king, but give great deference and adoration to his representative, the Governor-General, who resides in Canada. With all its limitations, the Crown fills a useful and important place in the Cabinet system. And the office is not, as is often assumed in the United States, a mere title, but stands as the symbol of unity, permanence, and the endurance of historic traditions in a government which has by progressive steps become one of the great democracies of recent times.

The executive department of England centers around the historic organizations known as the Privy Council, the Ministry, and the Cabinet. Composed of members appointed by the Crown, the Privy Council is the central executive body to which all Cabinet members must receive appointment. The Council, however, as a body exercises no special functions and participates very slightly in governmental affairs. Government is conducted by the ministry, which includes the heads of all of the executive departments, and by the Cabinet, which is composed of those

members of the administrative staff who are called upon to sit with the Prime Minister and to have a voice in the determination of public policies.

Under parliamentary government it is not only necessary that the executive and legislature be combined, but also that the courts exercise their powers and functions under the direction of this combined executive and legislative unit. They have no power to declare legislative acts invalid in England, and only a very limited power to do so in the self-governing colonies. The courts become an adjunct through which the legislative and executive will is enforced. Courts are thus made subordinate to the other branches of government. It would be a mistake, however, to assume that the courts do not occupy an important place in the English system of government. It is their duty to protect the liberties of the individual from illegal interferences and to guide all official acts along legal and established lines. The courts thus exercise a restraining power and a directive influence which is subject to reversal only by Parliament.

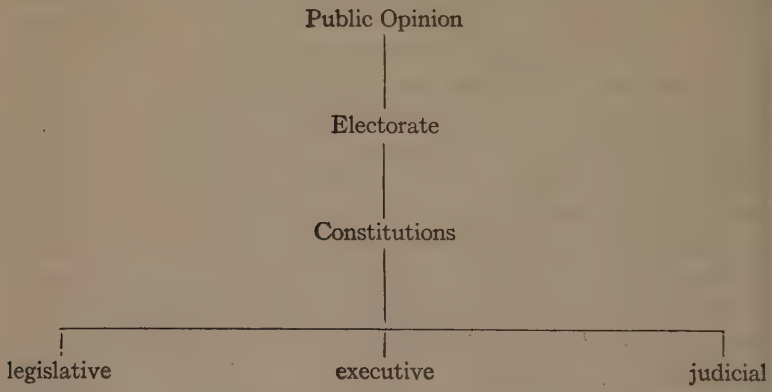
Cabinet or parliamentary government has been adopted in France and in a modified form in most of the continental European countries. It has been made one of the features of the governments of the self-governing colonies, Canada, Australia, and South Africa. And to a limited extent the Cabinet principles have been applied to the governments of Japan and of a few South American countries.

The Presidential System of Government in the United States

The Presidential Office.—In dignity, power, and influence the Presidency is one of the striking features of the American constitutional system. Although in operation it differs in some respects from the original intention, the Presidency stands as one of the most creditable features established by the Convention of 1787. Its success has been so marked

that it has been taken as a model for the executive organizations in most of the other states of the New World. It is therefore of interest to describe in particular the presidential office in the United States and to offer some comparisons between presidential government and parliamentary government.

In describing the position and powers of the President of the United States, it is necessary first to consider the basis of the presidential office in what is one of the fundamental theories of the American government, that is, the theory of the separation of powers. This theory is built on a plan which can be best indicated by the following diagram:



While it was the intention of the makers of the Constitution to create a fairly strong Executive, the powers granted in the Federal Constitution do not seem to indicate an intention to create a national leader. Through capable and imperious leaders like Jackson, Lincoln, and Roosevelt, who assumed the position of leadership, regardless of legal and constitutional limits, the Presidency has gradually developed to a position as the directing force of the public affairs of the nation. This advance in the authority of the position of the President has come not only as the result of the development of specific and enumerated

powers of the Constitution, but also in the assumption of new powers not anticipated in the fundamental law.

The Powers of the President.—While the Constitution places the appointment of officers in the hands of the President and heads of departments, it has resulted that the control over the Federal service, involving appointments to hundreds of thousands of positions, is wielded directly by the President. So strong is the position of the executive in this regard that Congress in enacting a civil service law merely indicated that civil service rules and regulations shall be put into force and effect so far as the President of the United States directs. Moreover, the President has authority to make exceptions to these rules, to remove entire divisions of the service from their operation, and to extend the service, if he sees fit. The power of appointment, which was granted by the Constitution, and that of removal, which was accorded to the President by common consent and by act of Congress, have given the Executive an enormous patronage which he can use as an effective weapon in leading and directing public opinion and in influencing his party on those matters on which he desires action.

The President's control over legislation is exercised in his messages to Congress, his veto power, and his indirect control as a party leader. The veto was granted to the President in order to render him independent of the departments, and in the early years of the United States was used quite infrequently. Presidents do not now hesitate to use the veto in order to enforce their ideas of the constitutionality of laws or of their expediency, and use freely their own personal discretion as to what should be enacted into law. The practice of sending messages has always been looked upon as an interesting phase of the President's power. Recently the practice of sending a special message to urge legislative action, and to assist in the preparation of and passage of statutes has greatly extended the influence of the President. The indirect control as party leader has

been developed by the President into an effective weapon by virtue of which he is regarded as the chief exponent of his party and the director of its policies, and through which he influences appointments and selections for positions in the federal service and guides the decisions of his party in difficulties and controversies which arise. Thus, he is looked upon as leader of his party throughout the entire nation. Congressmen frequently protest against the powers exercised by the President. Such a protest was voiced by Senator Cummins when he declared:

> The President passed the tariff law. The President passed the currency bill. The President is now summoning all his power to compel Congress to repeal so much of the Panama Canal Act as exempts our coastwise trade from the payment of tolls for passage through the waterway. It is highly probable that he will succeed in accomplishing his purpose, for while there is some independence still left in the Democratic majority, it is not strong enough to resist the power of the presidential office.
>
> Congress will never again be as free as it should be until we devise some other plan for the appointment of the officers and agents of the government who are to carry into effect the laws which Congress enacts. The patronage of any President has become a menace to legislative independence and gives the Executive a power over legislation that no Executive ought to possess.[1]

Although originally the power of the President in the enforcement of the laws was very slight, he has recently secured rather extraordinary powers in this direction. In the first place, through the acts of Congress and decisions of the Supreme Court, the President has been granted the ordinance-making power, particularly in the immigration and customs service and in the Treasury Department. These rules and ordinances have the force of law and give an effective power to the President in the administration of these departments. Moreover, the enforcement of the law has been rendered effective by the employment of

[1] "The President's Influence a Menace," *The Independent* (June 1, 1914), vol. lxxviii, p. 350.

special agents and investigators, of which the President now has a considerable number, whose business it is to see that Federal statutes are obeyed.

The appointive power of the President gives him considerable influence, particularly in determining the methods and policies of foreign representatives who are sent to take care of the interests of the United States. In the making of treaties the President exercises one of his greatest functions. He has the power to make treaties, to enforce agreements, and to involve the United States in international affairs, and only when treaties are completed or agreements formed is it necessary for him to consult the Senate. In the recognition of new countries and in negotiations and communications with foreign powers the President is the chief spokesman of the United States, and through the Secretary of State wields the entire power over foreign relations.

The most extraordinary power of the President is that which he exercises in war time. As a result of the precedents established under the administrations of Washington, Madison, Jackson, and Lincoln, the President of the United States becomes, for war purposes, a virtual dictator. Congress and the Supreme Court have accorded him the right of the full use of the armed forces of the United States for defensive purposes. Moreover, the President has suspended the writ of habeas corpus, has declared a state of blockade along the waters of the United States, and in fact has involved and can involve the United States in the equivalent of war against foreign countries without the consent of any other department of government. The extraordinary powers exercised by Lincoln, which were then looked upon as extra-constitutional, have come to be regarded as the legitimate powers of the President when the conditions of war demand extreme measures.

All of these powers combined give the President of the United States a very effective control and direction of the entire national administration. The Cabinet officers advise

and assist him, but act under his authority and direction, while he in turn becomes responsible for all of their acts. Upon the President devolves the authority and the guidance of the entire government.

These executive powers are greatly restricted when the President and his party loses control of both branches of Congress. The checks exercised by a hostile Congress over the President are largely negative in character and result in obstructing and delaying action. But only a part of the President's powers may be thus curtailed, and, as a rule, the President's party is in control of Congress.

The President and His Cabinet.—The significant feature of the presidential system is the relation of the President to the Cabinet officers. According to the Constitution, this relation is determined in the provisions which require the opinion of officers in writing and the arrangement for the appointment of inferior officers. To a large extent, the Cabinet as it has developed in the United States is unknown to statutes and is a growth of custom. It is one of the important extra-constitutional developments in the United States. The cabinet officers, unlike the members of the English Cabinet, are responsible to the President as individuals for the administration of their respective departments and also as a group of advisers on the general policies of the government. When they are acting in the latter capacity, their relation to the President is entirely personal and not obligatory through either constitutional or statutory law. Neither is the President obliged to seek their opinions or advice; when he does, he is free to accept or reject the same according to his own discretion. Full authority over the Cabinet is accorded to the President in the carrying out of the duties prescribed by Congress. The President exercises the power of removal without limitation. This power serves as an effective check and as a means of direction for the different departments.

The Relation of the Cabinet to Congress.—Though the

President appoints the members of his Cabinet, the approval of the Senate is necessary to confirm his choice. Congress determines and defines the powers vested in the Cabinet and directs and regulates in detail the organization and procedure of the various departments, while at the same time, in performing their duties, the Cabinet officers are directly responsible to the President, and it is he who must assume responsibility for their acts. Congress exercises considerable control over the departments through generous or restricted appropriations, and has the power to request information or reports from the different branches of the Cabinet. Formal investigations may also be made by the Senate and House of Representatives, which may lead to an exposure of facts that may result in forcing the resignation of a department head or subordinate official. Then, too, the members of the President's Cabinet are through custom more or less closely connected with Congress and possess the right to participate indirectly in legislative action, although they are not members of the legislative body.

But the former notion of isolation for the executive official has vanished, and in its place has come the idea that, to be a successful Cabinet secretary he must influence legislation as well as manage his department. The Cabinet officers not only give information before legislative committees, but actively urge and oppose pending measures. Moreover, in many cases the administration policies are formulated into tentative statutes in consultation with the heads of departments, the President, and members of Congress. Within recent years this influence of the Executive over the legislative department has grown rapidly. A long series of constructive laws, passed since the administration of President McKinley and including those

. . . dealing with the Hawaiian, Porto Rican, and Philippine governments, our relations to Cuba, irrigation, army reorganization, the regulation of corporations, the railway laws, the creation of the departments of Commerce and Labor, the provision for an Isthmian canal, for

a permanent census bureau, for a permanent rural free-mail delivery, the parcels post, the postal savings bank, the creation of great forest reservations, the inspection of meats, foods, and drugs, the income and corporation taxes, the conservation laws, the tariff of 1913, the currency act, and a host of others. Of this great array of constructive measures, all were either prepared in detail by executive officials or in closest consultation with them.[1]

No previous President has used the strength and influence of the executive department to direct and control the legislative process more than President Wilson. Under the President's guidance and with the full power of the executive departments important public measures were enacted into law, including the Underwood Tariff Act with a moderate downward revision, the repeal of the Panama Canal tolls, the Federal Reserve Act, the Income Tax Law, the increase of army and navy appropriations, and the strengthening of the marketing service, Federal Farm Loan Act, national aid to vocational education and to road building —in all, constituting one of the most remarkable records attained by any administration.

All of the powers of the President combined tend to make him not only chieftain of his party, but the leader of the nation on all matters of foreign and domestic policies. As the leader of public opinion, the President keeps in close association with the public press, gives out official statements and correspondence, and keeps the public informed on matters of important public policies. The President may present his views through public addresses and may thus help to foster public opinion. In all of these respects the President of the United States has developed the office far beyond that anticipated by the makers of the Constitution, and the Presidency has thus become one of the unique parts of the government of the United States. It is not surprising that the office of President should be looked upon with such favor as to prove suggestive to many recent

[1] J. T. Young, *The New American Government and Its Work* (The Macmillan Company, 1915), p. 18.

states, in the adoption of their constitutions, in the granting of similar powers to their Chief Executives.

Comparisons Between Cabinet and Presidential Systems

The Cabinet system involves the union of the executive and the legislative departments. With the Prime Minister at its head, the Cabinet directs both executive and legislative functions. The Prime Minister is final authority on all matters of dispute relative to party politics. Members of the Cabinet hold office because they have the support of the majority of the legislature. When they cease to have this support, they give place to a ministry who, for the time being, have gained the legislative support.

In contrast, the presidential system involves a separation of the legislative and the executive branches. The two departments are retained as equal and co-ordinate, and the heads of executive departments are not members of the legislature. They recommend legislation and may appear before committees of the legislature in support of their measures, but they are not members of either house. The chief executive and the members of the legislatures are regarded as equally independent and responsible to the people. The President of the United States is individually responsible for the entire field of administration. The heads of the executive departments are appointed by the President, are responsible to him, and may be removed at his pleasure. They advise the President on matters of policy, but he may disregard their advice whenever he chooses.

The English Cabinet acts as a unit. It is responsible both to the legislature and to the people. In the Cabinet government of England the legislative and executive departments combined exercise the supreme power of the state, subject to no legal limitation. Under the Cabinet system, the courts are not allowed to set aside actions of the legislature.

If the judges interpret a law contrary to the wishes of the legislature, the law may be changed. Judges are trained to respect the intentions of the lawmakers in the interpretation of statutes and to consider public opinion back of Parliament as the ultimate power. Cabinet government is essentially party government. The Cabinet holds office as a result of the election of its party, retains office as long as it receives its support, and must resign whenever that support is removed. Rival leaders continually face each other in Parliament, the one in office, the other seeking office. The opposition serves as a critic and check to all of the acts of the government.

In comparing the two systems of government, the parliamentary, or responsible, and the presidential, Professor Willoughby says that it is difficult to weigh the merits of each since it is not easy to dissociate the systems from other features of government.[1] It is to be noted, however, that in England, where the parliamentary system prevails, it is impossible for the two branches, the executive and the legislative, to be in political discord; whereas in the United States, under the presidential system, it is a matter of chance if there exists political harmony between the executive and the legislature. Professor Willoughby suggests that the possibility of lack of harmony found in the United States cannot be attributed entirely to the presidential type of government, but in part, at least, to the fact that the terms of office and time of elections are different in the three branches of government. Carrying the comparison farther, the same writer points out that the responsible system of Cabinet government necessitates a far higher political capacity on the part of the people than is required in the case of presidential government, that the parliamentary system "has worked well only in the case of England, whose people have had centuries of experience in the working of popular institutions. It has worked in-

[1] W. F. Willoughby, *The Government of Modern States* (The Century Company, 1919), pp. 356–358.

differently in France, and in most other countries has given very unsatisfactory results."[1]

Suggested Changes in the Parliamentary and Presidential Systems of Government

Though both the parliamentary and the presidential systems of government are acknowledged to be notable developments in democratic government, the two systems are held, at present, under scrutiny, with a view of modifying certain features in order to permit a progressive adaptation to new conditions. Especially is this true with regard to the parliamentary system. The inadequacy of the Cabinet system as found in England became evident when the many exigencies arising with the outbreak of the recent war had speedily and efficiently to be met. It was found necessary to reduce the size and modify the existing form until a Cabinet entirely different from that which had heretofore existed was evolved. Post war conditions have also made necessary some changes in the organization of the executive department. Weaknesses and desired changes have been indicated in reports made by committees both in England and in Canada[2] relative to the necessity of revising Cabinet government. The committees were authorized to make complete investigations of the distribution and execution of governmental functions and to recommend changes which would aid in the discharge of official duties. It was found that both in England and in Canada an intolerable burden of disposing of too many matters of trivial importance is placed upon the Ministers, that they have "both too much to do and do too much." The chief function of the Cabinet, as suggested by the report of Lord

[1] W. F. Willoughby, *The Government of Modern States* (The Century Company), p. 358.

[2] Important among these reports are: The Murray Report (Canada), October, 1912; Report of the Special Committee on Machinery of Government (Canada), Hon. J. S. McLennan, chairman; Report of the Machinery of Government Committee, Viscount Haldane, chairman; and the Committee on National Expenditures, 1918.

Haldane, should be the shaping of policy, the final determination of which, however, is to be referred to Parliament. This would involve the control of the executive in accordance with the policies prescribed by Parliament and the continuous co-ordination and delimitation in the activities of the various departments of government. The report also stated that a small Cabinet was advisable, that its meetings should be held frequently, that information and material necessary to expedite the forming of decisions should be supplied in convenient form, that the ministers affected by the decisions should be personally consulted, and that a systematic method should be employed to secure the carrying out of the decisions of the Cabinet by the department concerned. As suggested by the Haldane report, the business of the executive departments may be divided into the following ten groups: Finance, national defense, external affairs, research and information, production, employment, supplies, education, health, and justice.

The division of governmental functions recommended by the Special Committee on Machinery of Government in Canada is also of interest. In its deliberations the committee made use of the Murray Report on the Organization of the Public Service of Canada and reports of the United Kingdom relative to the same purpose. The executive functions of government were classified and divided by the committee into four groups—namely, basic, services to the public as a nation or as individuals, external affairs, and auxiliary services. Included in the basic functions are those pertaining to defense, justice, and finances. The second class is subdivided into fiduciary, regulative, and productive services. The first of these functions are those wherein the government acts as guardian for the nation of its public domain; the second, or regulative, are those which define, supervise, and restrict the powers conferred in corporations or the freedom of the individual or associations in the interest of the public; the third, or productive services, embrace those relative to the social well-

being and the economic efficiency of the people, such as health, immigration, labor, trade and commerce, agriculture, communication, and agencies of transportation. The third main division of executive functions includes the external affairs and those involved in the relations with other nations, while the auxiliary services tend to enhance the effectiveness of the other functions and cover such matters as legal advice, research and information, manufacturing, construction of public works, records, archives, and statistics. The object of such classification is to reduce the number of Ministers to ten and to require of those which remain technical knowledge and training. As to the composition of the Cabinet, it was suggested by the committee that there should be a Prime Minister who would be president of the council and Minister of external affairs, a Secretary of State, Ministers of Justice, Finance, Interior, Defense, Communication and Transportation, Production and Distribution, Labor and Public Works. Responsibility, it is suggested, should rest with individual Ministers for their administrative acts, while more responsibility should rest with individual members, especially in regard to making appropriations. Both the Haldane committee and the Canadian committee place emphasis on collecting and digesting information as one of the chief functions of the government. Through the proposed changes it seems possible that the control by Parliament may become real rather than formal, as it is at present, that the Cabinet would have more time for mature deliberation and supervision of the executive functions, and that full and accurate information could be secured by those responsible for executive or legislative action.

The presidential system of the United States, with its accompanying features of separation of powers and checks and balances, which became the prototype for the governments of the states and cities of the United States, after more than a century of almost unqualified acceptance is now being criticized in the light of modern administrative

developments, and at least some modification of the present system is felt desirable. In state, and particularly in municipal governments, changes are already in progress. A mayor type of city government, wherein the mayor corresponding to the president, is being replaced by a commission-manager form of charter modeled more nearly after business organization with an elected commission serving as a board of directors and a manager appointed by the commission placed directly in charge of the entire city administration. In the states, committees and commissions are making recommendations in the direction of placing greater duties and responsibilities upon the Governor, and at the same time establishing closer relations between the Governor and his Cabinet and the legislative bodies. A proposal for a modified parliamentary system has been offered and given serious consideration in several states. In the Federal government the lack of organic connection between the legislative and executive departments has led to numerous investigations, with suggested changes, and to concrete proposals for the adoption of some of the features of the parliamentary system. The view which has been held by some of the ablest statesmen is well expressed by James A. Garfield:

> I have long believed that the official relations between the Executive and Congress should be more open and direct. They are now conducted by correspondence with the presiding officers of the two Houses, by consultation with committees, or by private interviews with individual members. This frequently leads to misunderstandings, and may lead to corrupt combinations. It would be far better for both departments if the members of the Cabinet were permitted to sit in Congress and participate in the debates on measures relating to their several departments, but, of course, without a vote. This would tend to secure the ablest men for the chief executive offices, it would bring the policy of the administration into the fullest publicity by giving both parties ample opportunity for criticism and defense.[1]

As representatives of the President, the Cabinet members, through their proposed positions in Congress, could serve

[1] Quoted in P. S. Reinsch, *Readings on American Federal Government*, p. 48.

as better counselors and spokesmen for the executive than is now the case. Members of Congress, likewise, would have an opportunity to obtain more accurate information on pending legislation and to avoid mistaken action and, in some cases, serious blunders, which have been known to occur in the past through lack of information on the part of the legislators.[1]

[1] *Prepare a plan for closer connection and co-operation between the legislative and executive departments of* (a) *the Federal government,* (b) *state governments.*

SUPPLEMENTARY READINGS

A. Lawrence Lowell, *The Government of England*, especially Chaps. II, III, XVII, XVIII, and XXIII (The Macmillan Company, 1910).

A brief account of the working of the English Cabinet system.

W. F. Willoughby, *The Government of Modern States*, Chaps. V and XIV (The Century Company, 1919) give a suggestive comparison between parliamentary and presidential systems.

Consult:

Everett Kimball, *The National Government of the United States*, especially Chaps. VII and IX (Ginn & Co., 1920), and

Jesse Macy and John W. Gannaway, *Comparative Free Government*, Chaps. VI–VIII (The Macmillan Company, 1915), for the powers of the President and the relations between the President and the Cabinet.

CHAPTER IV

PROBLEMS OF LEGISLATIVE ORGANIZATION AND LEGISLATIVE METHODS

There is hardly any kind of intellectual work which so much needs to be done not only by experienced and exercised minds, but by minds trained to the task through long and laborious study, as the business of making laws. This is a sufficient reason, were there no other, why they can never be well made but by a committee of very few persons. A reason no less conclusive is, that every provision of a law requires to be framed with the most accurate and long-sighted perception of its effect on all the other provisions; and the law, when made, should be capable of fitting into a consistent whole with the previously existing laws. It is impossible that these conditions should be in any degree fulfilled when laws are voted clause by clause in a miscellaneous assembly.—John Stuart Mill, *Representative Government*, chap. v, p. 109.

The representative assembly, its organization and functions, and its place in popular government are among the greatest problems of politics. As a device to render popular participation in government feasible, the representative assembly has become almost universal in modern governments. Only small communities such as a few of the cantons of Switzerland seem to find it practicable to take care of public functions without the introduction of the representative idea. Despite long experience with representative government, legislative bodies have failed to fulfill the high hopes of the advocates of popular representation. The growth of a lack of confidence in legislative assemblies and the limitation of their functions are among the apparent tendencies of modern times. Elihu Root, in the closing address to the New York Constitutional Convention of 1915, said:

We found that the legislature of the state had declined in public esteem and that the majority of the legislature were occupying themselves chiefly in the promotion of private and local bills, of special interests—private and local interests upon which apparently their re-elections to their positions depended, and which made them cowards, and demoralized the whole body.[1]

Reasons for Lack of Confidence in Legislative Bodies in the United States[2]

It is a well-known fact that legislative bodies, from Congress to municipal councils, are in disrepute in the United States. Originally the legislatures of the states held a dominant position, owing to the fact that the executive departments were weak. The governor had no independent position and no veto power, and the judiciary was partially subject to the legislative department, which included among its powers the most important functions of government. From this position, wherein the legislature was the central organ of government, a condition has developed which has occasioned the lack of confidence in state legislatures.

They have too often been corrupt, negligent, and wasteful, they have in many instances made laws for the benefit of private persons and corporations, and bartered away charters and franchises; and they have even gone so far in some states as to repudiate portions of the public debt. These charges are not based upon mere hearsay evidence. The discreditable record of many of our state legislatures is written in the constitutions of the states and is described more fully in the debates of the conventions which framed those constitutions. In fact, the legislative history of the nineteenth century is the history of a steady reduction in the power of the legislature.[3]

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[1] New York Constitutional Convention (1915), Record, p. 4458.

[2] For a discussion of the causes of the lack of confidence in American legislatures, see P. O. Ray, *An Introduction to Political Parties and Practical Politics*. (Revised Edition.) (Charles Scribner's Sons, 1917), chaps. xviii and xix; and James Bryce, *Modern Democracies*, chaps. lviii and lix (The Macmillan Company, 1921).

[3] C. A. Beard, *American Government and Politics*. (Third Edition.) (The Macmillan Company, 1920), pp. 516–517.

The decline in public esteem is shown not only in the many restrictions placed upon state legislatures, but also in the general feeling of discontent, disapproval, and disgust with legislative results both in state and in nation. In addition to the many limitations and restrictions which are to be found in elaborate state constitutions, the recent adoption of the initiative, referendum, and recall[1] by some of the states bears significant testimony to the judgment as to the unsatisfactory conditions and inefficient methods which now prevail in legislative bodies.

It is a curious phenomenon that, with the growth of the principles of democracy and with the increased participation of the people in public affairs, there has resulted a general decline in the esteem with which legislatures are held by the American people. The reasons for this decline are difficult to analyze. A few of the obvious defects which have tended to foster lack of confidence may be briefly mentioned. These are, personnel, length of session and congestion of legislative dockets, restrictive rules of procedure and the committee system, and the lobby and the dominance of special private interests.

Personnel.—Though it has been frequently demonstrated that the members of the legislature are "fairly representative of the various groups and divisions of the population,"[2] it is nevertheless true that few of those who are elected to the legislature have any special preparation either for the drafting or for the consideration of bills; and very few, indeed, have the necessary qualifications to consider the economic, industrial, and legal problems which are entailed in the legislative process. Legislators are elected from small districts, and the influences surrounding them are local and provincial. They regard themselves as agents of groups and of special interests which desire government aid and protection. The chief business of the legislator is

[1] *Cf. supra*, pp. 110–117.

[2] See S. P. Orth, "Our State Legislatures," *Atlantic Monthly*, December, 1904; reprinted in P. S. Reinsch, *Readings on American State Government* (Ginn & Co., 1911), pp. 41 ff.

often conceived as the securing of funds from the public treasury which will benefit "my district." Furthermore, it is the practice to re-elect only a small portion of those who constitute the legislative body, with the result that the majority of those in the lower House and usually a large percentage of the members of the upper House comprise a new element in the legislative body, who get their first training and experience during the session. It is estimated that only about one-third of each new legislature has had experience in legislative work. So long as it is not customary to re-elect members of the legislature or to select those who have by training and experience secured a preparation for the requirements of legislation, it will be impossible to have an effective legislative body. Moreover, it is frequently the practice not to select from among the strong and capable members of a constituency, but to send to the legislature a member who is not representative of the best type of citizens in the community. There are many difficulties which account for this practice; nevertheless, it is one which is detrimental to the general effectiveness of the legislature.

> It is not to be expected that legislators will become expert lawmakers. It is out of the question that members will be able to investigate intricate subjects, examine legal technicalities, draft bills, or pass upon details. . . . So long, therefore, as we have representative government, we must expect the members of the legislature to be ordinary, intelligent men without expert knowledge.[1]

Length of Session and Congestion of Legislative Dockets.—One of the chief difficulties in the legislative process is the short time within which legislatures are required to complete their work. It is customary to prescribe a limit of from thirty to ninety days for a biennial session of the state legislatures. In this time a great many bills are presented, and many more are passed than it is possible to give adequate and critical consideration. The volume of legislation,

[1] John A. Lapp, "Making Legislators Law Makers," *Annals of the American Academy of Political and Social Science*, March, 1916.

along with the limitations of time, has resulted in the adoption of rules of procedure by which it is intended that business shall be done quickly without any detriment to the public interests. As a result of the short session a great part of the time is taken in the presentation of bills and in the consideration of measures in committee, leaving a very small amount of time for the passage of measures. Thus, it is not unusual for fifty or a hundred bills to be passed on the last few days in a rush which gives little or no time to the careful consideration of separate measures. Furthermore, constitutions contain rules of procedure which tend to hamper the legislature rather than to expedite the legislative process, such, for example, as the requirements for the reading of bills, which must either be ignored or perfunctorily performed by reading titles. The practice of bringing in special rules to govern procedure with respect to matters in which the legislative leaders are concerned, and of setting aside rules of procedure by unanimous consent, often fosters contempt for constitutional limitations.

Another matter frequently commented upon relative to American legislatures is the enormous number of bills presented at each legislative session and the great number and variety of bills enacted into laws. Different causes contribute to the grist of the legislative mill. In the first place, individual members can introduce bills freely instead of securing the consent of the House or a committee in advance as was formerly the practice in Congress and in the state legislatures. Again, a large number of bills approximating as high as 60 per cent in certain legislatures are introduced at the request of individuals or societies.[1] Many duplicate bills or bills dealing with substantially the same matters are introduced. It is not unusual for ten or more bills to be presented to accomplish the same purpose. Finally, it is regarded as enhancing the prestige of a mem-

[1] "Legislative Procedure in the Forty-eight States," Bulletin No. 3, *Nebraska Legislative Reference Bureau*, p. 9.

ber if his name is attached as the proponent of many bills. Although attempts have been made to restrict the freedom of members to introduce measures, none has proved acceptable in practice.

Restrictive Rules of Procedure and the Committee System.—While there are great differences in the practices and the procedure in the various state legislatures, a few general characteristics may be briefly noted. One of the special features of American legislatures is the extraordinary power of the speaker based upon:

a. The right of recognition and the right to make rulings which can be reversed only by majority vote.

b. Power of appointment which includes the selection of chairmen and members of the committees.

c. Power of reference—selection of the committee to which a bill is referred.

With these powers and the control of all the important committees the speaker and a few of the members practically control the business of a session.

A feature which differentiates American legislative procedure is the division of the houses into numerous committees upon which devolve a large part of the burden of sifting evidence, of passing on various proposed bills, and of making recommendations favorable or unfavorable to passage. Perhaps nothing indicates so well the cumbersome methods of American legislatures as the number and size of the committees. The number of committees varies from about thirty to seventy and the members of each committee, from ten to forty. Each member is expected to serve on five or more committees.

Such an endless multiplication of committees would of course be impossible if it were not that the burden of work is confined to a few of the more important, while others meet but irregularly throughout the session. Everywhere the committees on appropriations, judiciary, and municipal affairs will be found crowded with work. Of less importance, although with plenty to do, will be found committees dealing with

agriculture, banking, county affairs, education, corporations, railroads, fish and game, and roads and bridges. Then follow the committees, whose work is almost negligible. It has been stated by members of experience that twenty-three of the forty-one committees of the Pennsylvania House are of no importance and could readily be abolished. Of the thirty-eight committees of the Ohio House of 1915 there were sixteen which considered less than ten bills each out of a total of nine hundred and twelve introduced. In the session of the same year twelve committees of the Vermont House, eleven of the Senate, and six joint committees, received less than ten bills each. Evidently some readjustment is needed. A few committees are overwhelmed; others never meet.[1]

This division into committees seems to have been necessary, owing to the great amount and variety of matters presented to American legislatures, but it has tended to divide and disperse responsibility and thereby to weaken the power and influence of the body as a whole.[2] The chairman of such committees frequently can decide whether or not a public hearing shall be held, and committees have the privilege of reporting bills or of refusing to make any report. It is evident that numerous large committees mean a lack of responsible action and of open public discussion. The actual work of committees is usually accomplished in what is known as "executive session." Here the few legislators vitally interested in or opposed to measures are afforded an opportunity either to push them through the committee or to kill the measures, with little possibility of being held responsible for the action and with little concern as to what the majority of the legislature may approve or disapprove. The committee system in American legislatures has taken, to a great extent, the place of the rule of the majority of the house. While it is possible to bring proposals before legislatures when an unfavorable report is made by a committee, the process is in most cases so difficult as to prove well-nigh prohibitive.

[1] H. W. Dodds, "Procedure in State Legislatures," *Annals of American Academy of Political and Social Science*, May, 1918, pp. 40–41.

[2] For a good account of the committee system see A. N. Holcombe, *State Government in the United States* (The Macmillan Company, 1916), pp. 253 ff.

The committee system and the elaborate rules of procedure designed to bind legislative action have had the following results:

I. The real work of the legislature is performed through committees.

II. Toward the end of the session the business of the House is largely in the hands of the Speaker with the Committee on Rules and a steering committee whose duty it is to save as many as possible of the important public bills.

III. The elaborate rules which bind the Houses during the early part of the session are pretty consistently ignored during the closing days, when by unanimous consent numerous bills are hurriedly rushed through.

IV. There is little real debate on the floor.

Almost universally [says Professor Holcombe] the actual work of the committees is done in secret or executive session, and there is no provision for roll-calls on contested measures, or for any record of committee proceedings. A more irresponsible procedure could not be devised.[1]

The Lobby and the Dominance of Special Interests.—A primary cause of the decline in prestige of American legislatures is the conviction that much legislation is secured through special interests which maintain lobbies for the purpose of influencing legislation. It is generally recognized that a citizen who is interested in any proposed legislation has a right to employ an agent to collect evidence and to present it to the committee or to the members of the legislature in a fair and open manner. But the sinister nature of the lobby has been described suggestively by Governor Russell of Massachusetts:

There exists in this state, as in other states, an irresponsible body, known as the lobby, representing or preying upon special interests, which professes and undertakes for hire to influence or control legislation. Its work is wholly distinct and different from the advocacy of one's cause in person or by counsel or agent, which is the constitutional right of everyone. It seeks often to control nominations and elections and to subject the individual legislator, directly or indirectly, to secret and improper influences. It throws suspicion upon the honest and temptation in the way of the dishonest. Professing power greater than

[1] A. N. Holcombe, *State Government in the United States* (The Macmillan Company, 1916), p. 258.

it has, it frequently extorts money as the price of silence or unnecessary assistance. It has initiated legislation attacking the interests of its clients, in order to be hired to defend those interests. It has caused the expenditure of large sums of money to obtain or defeat legislation. It cares little for the merits of a measure or the means employed to make it successful. In my judgment improper measures have, by its influence, been made law against the public interests and just measures have been defeated. These criticisms have not been based upon rumor or conjecture, but upon facts reported after a most thorough investigation by your predecessors who denounced the evil in unsparing terms and diligently sought a remedy.[1]

Various methods have been tried to overcome, or at least to lessen, the evils resulting from the practice of lobbying, but they have met with little success. Chief among these attempts has been the policy of making public the names of lobbyists, together with the compensations which they receive for their services. Some states also require that the names of such paid agents, as well as the names of the persons employing them and the nature of the measures for which they are working, be registered with the sergeant-at-arms. Further efforts have been made to secure even more drastic legislation against the lobby, but in the main little has been accomplished except to prevent lobbying in the legislative halls and corridors, to require registration, and to secure a certain element of publicity in connection with personal solicitation. It is recognized, however, that the laws enacted against the lobby have accomplished little in the way of improving the methods of influencing legislation.[2]

Although it is generally taken for granted that legislatures are lawmaking bodies, the part which they perform is to an increasing degree little more than registering the ends sought and planned by those desiring government assistance and protection. It has been said that legislatures

[1] From a message to the Massachusetts legislature, January, 1891, quoted in P. S. Reinsch, *Readings on American State Government*, p. 79.

[2] A. N. Holcombe, *State Government in the United States* (The Macmillan Company, 1916), p. 275.

. . . make law to-day only as the Electoral College elects a Chief Magistrate. To a great extent legislators merely formulate and ratify measures already prepared elsewhere. Very seldom, indeed, does a member of a legislature introduce a bill drafted by himself and in which he himself is personally interested. Bills are prepared by associations, clubs, individuals, and party managers. They are taken to the state capital by paid agents who ascertain what representative and what senator are, on the whole, the best persons to introduce the measures as drafted, and who then watch them through every stage of the progress to enactment or defeat. Legislatures, in fact, have become forms, and the real lawmaking power has moved back into the hands of individuals, party organizations, and other voluntary associations.[1]

The chief objection, then, to legislative methods is based upon the belief that most of the legislation is the result of the influence of special and private interests. It is an undisputed fact that many of the laws which pass the legislature are the result of understandings made between representatives who stand for certain special interests and who, in order to have measures passed to protect these interests, trade votes freely with their colleagues. This practice, known as "log-rolling," has been used in America to such an extent as to bring the entire legislative process under suspicion. On the whole, the most pernicious practice among lawmaking bodies is the giving of time and attention to petty local matters by which legislative procedure becomes largely a matter of trade and barter. Each member under such a practice regards it his duty and privilege to draw upon the public treasury for the special benefit of his locality and to satisfy the persistent demands of special interests. The onslaught on the public treasury by special interests and for the benefit of local needs has led to the familiar "pork barrel" methods, which are nothing short of scandalous. To a large extent the foregoing evils are attributed to the district system of electing representatives whereby a member is chosen from a small territorial unit whose interests and advantages he is expected jealously to guard.

[1] F. H. Giddings, *Democracy and Empire* (The Macmillan Company, 1900), pp. 252–253.

In addition to the other evils of the district system, such as the tendency to emphasize local interests in preference to state or national interests, and the practice of selecting an inferior representative because he resides in a particular district, the system affords an opportunity for a type of political maneuvering which has become notorious in American politics. This form of maneuvering, by which a majority party attempts to gain representatives at the expense of the minority parties, is known as "gerrymandering," named after Gov. Elbridge Gerry of Massachusetts, whose party passed a law to disfranchise the Democrats. The method employed was to concentrate its opponents' majorities and scatter its own, thus giving itself small majorities in many districts and its opponents large majorities in a few districts. The scheme of disfranchising the minority soon became the practice of all parties. As a result of this practice state and national legislatures frequently do not represent the relative strength of the parties electing those bodies. Some notable illustrations of the practice are described by Professor Commons.[1] For example, in the Fifty-first Congress, which enacted the McKinley tariff law, a majority of the representatives were elected by a minority of the voters. The results of the advantages which may be gained by the dominant party through the district system and the practice of gerrymandering are shown in the elections to Congress in 1894. Out of a total vote of 11,288,135 the following results were obtained:

	Votes Cast	Per Cent of Votes	Number of Representatives	Per Cent of Total Representatives
Republicans	5,461,202	48.4	245	68.8
Democrats	4,295,748	38.1	104	29.2
Populists	1,313,644	11.7	7	2.0
Prohibitionists	182,679	1.6	0	....
Others	24,862	....	0	....

[1] J. R. Commons, *Proportional Representation* (Thomas Y. Crowell & Co.), chap. iii.

The Republicans had a majority of 134 in this Congress, although less than half of the vote was cast for Republican Congressmen.[1]

Although Federal and state laws require that representatives be elected "by districts composed of contiguous and compact territory and containing as nearly as practicable an equal number of inhabitants," gerrymandering is practiced by all parties. For example, Virginia, with a Democratic vote in 1909 of approximately 60 per cent, sent to Congress nine out of ten, or 90 per cent Democratic Congressmen. In 1908 Michigan was 62 per cent Republican, 37 per cent Democratic, but all the Congressmen elected were Republicans.[2]

But the decline of confidence in representative assemblies is not confined to the United States, where special interests are reputed to exercise a dominant influence and where "pork barrel" and "log-rolling" methods frequently prevail. A similar decline has been noted in the position and prestige of the House of Commons as a legislative body.

Decline in the Position of House of Commons

Just as legislative bodies have been losing their place in the confidence of the people of the United States, so a similar change has taken place in England in regard to the prestige of the House of Commons as a lawmaking body.[3] The changes which appear to be lessening the influence of the legislative body in England are the placing of increased power in the hands of the executive and the submission of legislative questions directly to the popular vote. And, whereas the representatives in the House of Commons were once the spokesmen of the people, the Ministry now are the responsible agents of the nation, or perhaps more

[1] J. R. Commons, *Proportional Representation* (Thomas Y. Crowell & Co.), pp. 57–58.

[2] R. E. Andrews, "The Grip of the Gerrymander," *The Independent* (May, 1911), vol. lxx, pp. 1002–1006.

[3] R. L. Schuyler, "The Decline of the House of Commons," *Columbia University Quarterly*, October, 1919.

accurately of the party which they represent. The fate of the Ministry is no longer decided by the House of Commons, but rather the personnel of the latter is determined by the preference shown by the electors in selecting the Prime Minister. According to the opinion of Sir Sidney Low:

> . . . the House of Commons no longer controls the executive; on the contrary, the executive controls the House of Commons. The theory is that the Ministers must justify each and all of their acts before the representatives of the nation at every stage; if they fail to do so, these representatives will turn them out of office. But in our modern practice the Cabinet is scarcely ever turned out of office by Parliament *whatever it does*.[1]

The influences which have aided in bringing about the change in the position of the House of Commons have been attributed to the development of the party system with its strict discipline, to the inferiority of the House of Commons over the press as a means of expressing public opinion, and to the social transformation which has recently taken place in England.

Proposed Reforms

It is obvious that the defects which are causing a decline in the confidence in legislative bodies should be eliminated. In fact, definite efforts are being made to restore the good will of the people toward legislatures. A few of the problems connected therewith, as well as others that arise from the attempt to adjust representative government to meet the complex political conditions of the present time, require some consideration. Among these are the limitation of the scope of legislative power and functions, the abolition of the district system and the adoption of proportional representation, the securing of expert service in lawmaking, and the advisability of changing the present form of legislative organization.

The Limitation of the Scope of Legislative Power and Functions.—That so many results of legislative action have

[1] Sidney Low, *The Governance of England* (G. P. Putnam's Sons, 1914), p. 81.

seemed to be unsatisfactory is due in part to the failure to distinguish the various types of legislative functions and the differences in methods which are necessary in dealing with the diverse powers intrusted to representative bodies. To realize the difficulty it is only necessary to analyze a few of their distinct duties. The chief duty of legislative bodies is to act as organs for the expression of public opinion. Efforts to perform this duty have sometimes been dissipated because of the mass of details regulating administrative departments and because of the amount of time and consideration given to local and private bills. But the practice of placing responsibility for the initiation of legislation in the hands of administrative officers is a tendency which is gaining in favor and is helping to restore emphasis to the primary function of the representative assembly. The change now well under way is described by Mr. Willoughby:

> In England this movement has gone so far that it can almost be said that Parliament has ceased to be a legislative body, practically speaking, and has reverted to its original function of serving as an organ of public opinion. All legislation of importance is now drafted by the Ministry in power and is put through that body without change except as the Ministry may acquiesce in such modification. The inability of the House to modify ministerial proposals arises from the fact that the Ministry in power necessarily has a majority in the House, and this majority, under the practice now firmly established, is practically pledged in advance to make its action conform in all respects to such Ministry. The power of the individual member to introduce measures and secure their passage has steadily diminished until it no longer has any significance in determining the character of legislation that shall be enacted.
>
> In the United States we are still in the midst of a similar evolution. More and more the people are looking to the President in the case of the national government, and to the Governors in the governments of the states, to formulate and secure the enactment of all acts of general importance. There can be no doubt, moreover, that this movement is one which has generally commended itself to the populations of both countries.[1]

[1] W. F. Willoughby, *The Government of Modern States* (The Century Company, 1919), p. 295.

Thus it is the primary function of the legislative assembly to serve as a channel through which the public may bring influence to bear on the formation of government policies as well as on the methods of administration pursued. For the performance of this duty it becomes necessary that heads of departments and executive officers present to the legislative chambers adequate information on the expenditure of public money and on the methods and procedure in administration. Furthermore, no steps can be taken involving new policies or the application of general rules without first securing the consideration and approval of the legislative chambers.

A function no less significant, from the standpoint of American legislatures, is that which has to do with the organization of the administrative branch of the government, the work which shall be performed, and the money which shall be expended thereby. From this standpoint the legislature has been designated as the board of directors of a public corporation, "representing and acting for the citizen stockholders; it is its function to give orders to administrative officers; and, as a correlative and necessary function to take such action as will enable it at all times to exercise a rigid supervision and control over the latter, with a view to seeing that its orders are properly and efficiently carried out."[1] From the standpoint of the duties of the legislature as a board of directors for the public there is a question whether the function of the chambers should be to determine authoritatively the main features of government organization such as the creation of offices, the determination of the duties connected with them, methods of procedure, and limitations to be placed thereupon, or whether the primary responsibility for both legislation and administration should be placed upon executive officers, with the assemblies acting in an advisory and critical capacity. The latter method is that toward which par-

[1] W. F. Willoughby, *The Government of Modern States* (The Century Company, 1919), p. 302.

liamentary governments appear to be progressing, whereas the former is the practice to a large extent prevailing in the Federal and state governments of the United States.

A large part of the time of American legislatures is given to the passing of laws which relate to the details of administration.[1] Such laws, for example, as relate to the rules of procedure in courts of justice, the determination of boundaries of school districts, the payment of pensions or private claims, and a host of other matters might well, it is claimed, be provided for by executive departments with the authority to make rules and regulations under a definitely approved system. If the minor matters which are concerned merely with the details of administration and which can be handled better by executive and administrative officers were removed from the consideration of American legislative bodies, much of the business which now engages the attention of legislators would be eliminated and the time could be given profitably to the formulation of public policies. The strictures of J. S. Mill on legislative bodies are as true to-day as when he first contended that a popular assembly is not fitted to administer or to dictate in detail to those who have the charge of administration, and that,

> even when honestly meant, the interference is almost always injurious. Every branch of public administration is a skilled business which has its own peculiar principles and traditional rules, many of them not even known in any effectual way, except to those who have at some time had a hand in carrying on the business and none of them likely to be duly appreciated by persons not practically acquainted with the department.

The method of confining legislatures to the enactment of laws involving policies and general principles has been accomplished in a more or less effective manner through

[1] "Much of the work now attempted by the state legislatures is work for which large representative bodies are not fitted. No inconsiderable portion of the output of legislation so-called consists of measures of an administrative or quasijudicial character. Practically all private and local legislation is of this character. Fully half of the time of the legislative committees is devoted to the consideration of such measures."—A. N. Holcombe, *State Government in the United States* (The Macmillan Co., 1916), pp. 278–279.

the French administrative system and the English plan of provisional orders. These devices by which executive officials make rules and regulations which have the force of law will be considered further in a subsequent chapter.

Abolition of the District System and the Adoption of Some Plan of Proportional Representation.—Among the changes recommended to improve the method of representation in legislative bodies is a system of election by which a member would not be the representative of a small local district, but would be elected at large from a more extensive unit of the state. Some system of election on a general ticket involving the adoption of the principle of proportional representation is regarded necessary in order to secure a legislative body which will not devote the greater part of its time to the petty projects of local and private interests. Such a change is particularly necessary in the United States where the method of electing representatives by single districts has led to the evil of gerrymandering.

Various devices have been tried to secure minority representation and to prevent the flagrant irregularities of the gerrymander.[1] One of these is the limited vote by which the voter, when twelve representatives are to be elected, can vote for only seven. This arrangement generally assures the selection of one or more representatives from minor parties, but the distribution is largely on the basis of chance and neither majority nor minority parties are satisfied. Another method to check the gerrymander is the cumulative vote whereby the voter is entitled to as many votes as there are representatives to be elected, but he may distribute them among the candidates as he sees fit, concentrating, if he so desires, upon one or more of the candidates. Minority parties thus have an opportunity to secure representation. The chief instance of the trial of the

[1] See B. F. Moore, "The History of Cumulative Voting and Minority Representation in Illinois, 1870–1908," *The University Studies*, Illinois (March, 1909), vol. iii, no. 3, pp. 8–11.

cumulative vote in the United States has been the state of Illinois, where the constitution of 1870 provides that

> . . . in all elections of representatives aforesaid each qualified voter may cast as many votes for one candidate as there are representatives to be elected, or may distribute the same, or equal parts thereof, among the candidates as he may see fit; and the candidate highest in votes shall be declared elected.

According to Professor Moore the cumulative method has

> . . . in practically all cases given a minority party representation; but this does not necessarily imply that it gives exact proportional representation . . . [but] so far as the two dominant parties are concerned it has led to a proportional representation approaching mathematical exactness.[1]

Although the cumulative vote in Illinois has at times given an undue representation of the minority party, it has greatly reduced the evils of the gerrymander. It appears to be favorable to the two-party system and to strengthen party discipline to the discouragement of independent voting, a difficulty which proportional representation is designed to overcome.

Proportional Representation.—The chief feature of the plan of proportional representation is that representative bodies are so chosen that all reasonably large groups of voters will be represented in proportion to their numbers.[2] For example, a political group casting 40 per cent of the total vote in a state election would be entitled to four tenths of the seats in the state legislature. It is claimed that a representative body on this basis would more nearly represent the whole electorate than is now the case under the existing system of plurality representation where the greatest number of votes selects a single candidate in each of the several representative districts.

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[1] *Cf.* B. F. Moore, "The History of Cumulative Voting and Minority Representation in Illinois, 1870–1908," *The University Studies*, Illinois (March, 1909), vol. iii, no. 3, pp. 17–18.

[2] C. G. Hoag, *Effective Voting*, Document No. 359, Sixty-third Congress, Second Session.

The general ticket system, in which a number of representatives is selected from a large district on a single ticket with a plan of proportional representation, was recently adopted in France for the election of members of the Chamber of Deputies. Other countries, among which are Belgium, Sweden, Finland, Denmark, Tasmania, Australia, South Africa, as well as a few of the cantons of Switzerland, use some form of proportional representation. The system was adopted also in 1912–13 for the election of the Irish Senate in the Irish Home Rule Act as passed by the British Parliament.

So far proportional representation has made little progress in the United States. Illinois adopted in 1870 a provision for minority representation, although the system used in that state is not generally considered to be one of proportional representation. A proposal to initiate proportional representation in voting for members of the legislature was defeated in Oregon in 1914, and a similar proposal for its inclusion in city charters was rejected by the legislature of Massachusetts in 1915. Municipalities have frequently considered its adoption, but so far only a few have adopted it.

The Hare System.—The Hare system is one of the various plans of proportional representation and is possibly the best known. It was formulated by Thomas Hare in 1859, and provides that, although the citizen should have a single vote, he may indicate his preference among the candidates as first choice, second choice, and so on to the end. The quota is then ascertained by one of two methods: the number of votes cast is divided by the number of representatives; or, in order to make the result more accurate, the Droop quota (that is the number of representatives plus one) is used to determine the number of votes necessary for election. In the counting of the votes, a candidate of the first choice is given just enough votes to fill his quota, the remainder being passed on to candidates not yet elected, in order expressed in the preferences. If

any candidate is elected by the votes he has received as second choice, the surplus votes are given to a third choice, and so on until the full list of seats is filled. In practice, the system is difficult to apply to large districts, because the ballot boxes must all be brought to a central bureau to be counted. There is a considerable amount of chance in the order in which the ballots are counted, although various devices have been suggested to insure accuracy. This single transferable vote is in use in Denmark, Iceland, Moravia, and Tasmania.[1]

Another plan, known as the List System, records not only the choice of the individual voter, but also of the parties or groups voting. The progress of proportional representation has been retarded by the complicated procedure necessary to secure an accurate distribution of the votes and by the difficulty in arranging for the count. Despite its difficulties, proportional representation is gaining in favor as a satisfactory method to eliminate some of the defects of the district system.

It is claimed that proportional representation not only gives a fairer and more reasonable basis of representation, but also that this system will result in greater interest in, and consideration for public measures and national policies. Thus the system is advocated as a check upon the tendency to fritter away time in legislative bodies on local and special

[1] Where the Hare System of Proportional Representation has been adopted:

Tasmania (1896 — Parliament, Partial)
Tasmania (1907—Parliament)
South Africa (1909—Senate and some cities of the Transvaal)
Ireland (1914—Senate and part of Commons, under "Parliament of Ireland Act")
Ashtabula, Ohio (1915)
New Zealand (1915—Legislative Council. Optional for cities)
Sydney, Australia (1916)
Durban, South Africa (1916)
Calgary, Alberta (1916)
Boulder, Colorado (1917)
British Columbia (1917—Optional for cities. Since adopted by several)
Kalamazoo, Michigan (1918)
Great Britain (1918—Eleven seats in Commons)
Scotland (1918—School Boards)
New South Wales (1918—Legislative Assembly)
Ireland (1919)—Municipalities

The details of the ballot and the count can be secured from the American Proportional Representation League, C. G. Hoag, Secretary, 801 Franklin Bank Building, Philadelphia.

projects. Whether these claims will be fulfilled has not yet been conclusively demonstrated although the countries which have tried the plan regard it as reasonably successful.

Reforms in Legislative Procedure.—It is generally conceded that some of the most serious defects in the legislative process are connected with the customary rules of procedure. Only a summary of the proposed reforms to remedy these defects can be given.

First, it is proposed that the rule requiring a reading of every bill in full upon three separate days in each house be eliminated. This rule is no longer followed in practice and the original necessity for it has disappeared since all bills are printed and furnished the members in advance of consideration. Second, various devices have been recommended to restrict the introduction of bills—namely, to limit the number of bills one member may introduce, to limit the days of the week on which bills may be introduced, and to establish a more rigorous procedure for special and local bills. An arrangement such as that provided by the British Parliament, whereby the public bills are given precedence over private and local bills and receive attention during the greater proportion of the time would, it is thought, render possible greater consideration of important public policies. The practice of the House of Commons, where most of the bills are considered in the committee of the whole and where the discussions are participated in by the entire house, private bills being relegated to committees and to the very slight consideration granted when public business does not interfere, might well be adopted in American legislatures. One important change that would lead to better results from legislatures would be a more definite recognition of the distinction between public and private bills and the adoption of a method of procedure which would give the major part of the time of the house to public bills. This plan, it has been suggested, might be made effective by giving the governor and the members

of his cabinet the right to present measures to the legislature and to require that these measures receive first consideration.

Third, an effort has been made to reform committee organization in the legislature by (1) reducing the number of committees, (2) reducing the size of committees, and (3) limiting the number of committee memberships to each member. To remove some of the causes of complaint against procedure by committees constitutional provisions have been enacted requiring that all bills be referred to committees and be reported on to the legislature and that all committee meetings shall be open to the public. A few constitutions forbid the introduction of bills after a certain date and thereby avoid undue congestion in the last days of the session. One state, California, provides for two parts to a session, one for the introduction of bills and one for their consideration with an intervening period for careful investigation by committees and by other parties interested in the legislative projects. For the careful consideration of bills a better distribution among the various committees is imperative. Out of a total of 1,041 bills presented to the House in the 1917 legislative session in Illinois, 460 were referred to three committees, whereas many committees had very little to do.[1] That more effective discussion of measures may be secured, it has been proposed that committees should be required to provide for a fixed schedule of meetings, with calendar announcements in advance, to grant full publicity in all hearings, and to require the keeping of records.

To avoid congestion at the end of the session with the consequent haste, confusion, and disregard of the rules, it is proposed to lengthen the session. The Massachusetts system of an unlimited session is much more likely to secure careful and adequate consideration of bills. It is difficult to understand why measures of great public significance should be rushed through the legislative mill in a grand

[1] *Illinois Constitutional Convention Bulletin*, No. 8, p. 564.

scramble in order to close a session within the constitutional limit.

The Securing of Expert Service in Lawmaking.[1]—Not only has it been found necessary to limit the scope of legislative activity, but methods have been considered to secure information and expert assistance in the legislative process. To enable the legislature to do its work, improvement in the organization of the assistants who are to do the detailed work is imperative. There must be permanent, expert, nonpartisan officials who make a business of legislation, and who can bring to the representatives of the people an efficient kind of professional service. Better organization is necessary to secure legislative information; and when the information is secured, the services of an expert are essential to draft into effective legal provisions new proposals for legislation. Bill drafting is a technical matter which involves great difficulties and requires skill of the highest character. A single word may change the entire meaning of an important statute, as has been found in numerous instances. It has been necessary to call special sessions of legislatures to correct mistakes in careless or unsatisfactory bill-drafting. The object of draftsmanship in law-making, according to Justice Stephens, is greater accuracy, for, "it is not enough to attain to a degree of precision which a person reading in good faith can understand; but it is necessary to attain a degree of precision which a person reading in bad faith cannot misunderstand."

The existing agencies for furnishing information and rendering expert assistance in the preparation of legislative enactments are:

I. State legislative reference bureaus and drafting departments.

II. Municipal reference bureaus which render assistance to members of state legislatures.

III. Legislative drafting or research departments attached to universities such as the legislative drafting bureau of Columbia University

[1] A good summary of the reference library movement is found in the volume by J. B. Kaiser, *Law, Legislative and Municipal Reference Libraries* (Boston Book Company, 1914).

and such drafting or research bureaus as have been established in the universities of Illinois, Texas, and Washington.

IV. Committees of the various state and city bar associations appointed to examine and report on bills pending in state legislatures.[1]

The most important of these agencies from the standpoint of the public are the legislative reference bureaus and the bill drafting departments usually established in connection with the state Capitol.

Legislative Reference Bureaus.—Although state libraries have for a long time been rendering special service to legislators, legislative reference work in the strict sense was initiated by the appointment of a Legislative Librarian in the New York State Library in 1890. This librarian indexed the laws of all the states so that their methods and experience might be available to the New York legislator. The idea gained little favor, however, until 1901, when the Wisconsin legislative reference department, with Dr. Charles McCarthy in charge, was established by the Wisconsin Free Library Commission.

The following description of the work undertaken by Doctor McCarthy indicates what may be undertaken and accomplished by such a bureau:

> On his appointment in 1901 Dr. McCarthy, the legislative librarian . . . (Wisconsin) started a clipping bureau. He collected all of the pamphlets, bulletins, reports of commissions, magazine articles, and the like that he could get free. He accumulated as many duplicates as possible for free distribution. He classified them and arranged them under proper headings, paying special attention to the subjects that he knew would come up at the next legislative session. He searched the libraries of the several State departments and brought over whatever he thought would be an aid to the legislature. By the time the session met in 1903 he had not what would be called a library, but an up-to-date, live set of aids to lawmakers.
>
> But this was preliminary. As soon as the elections had been held he sent to all the members of the incoming legislature a circular, telling them something of what he had on hand and offering to assist them

[1] Report of the Special Committee on Legislative Drafting of the American Bar Association; Appendix B, by J. David Thompson, Sixty-third Congress, Second Session, Document No. 262.

by furnishing information, copies of laws enacted, or bills introduced in other states, etc., on any measure that they proposed to bring before the legislature. Over one hundred requests came in, and he forwarded by mail his clippings, pamphlets, and bills. When the legislature assembled he moved his collection to a room on the same floor. He circulated among the members, brought them to his library, and showed them what he had. He learned what they wanted, and if he did not have it on hand he immediately wrote or wired to all parts of the country to get it.

When the committees were appointed and began their work he helped them in the same way. He sent hundreds of copies of their bills to experts, commissions, lawyers, and informed citizens in Wisconsin and other states, asking for criticisms, improvements, and accounts of whatever experience they might have had on the points involved. If a lobbyist made a statement before a committee he would have replies . . . within a day or two . . . from the parties who knew the facts. The chairman of the Committee on Claims has given several instances where these replies saved the state hundreds and even thousands of dollars. Other committees were aided in a similar way. The committees on railway legislation, primary elections, and civil-service reform at the sessions of 1903 and 1905 had before them . . . the bills introduced in other states, the hearings on those bills, arguments of counsel, the best pamphlets and magazine articles, besides pertinent letters from the best-informed men of the country.[1]

Legislative reference bureaus connected with state libraries, universities, or historical societies have been established in Alabama, North Dakota, Rhode Island, Connecticut, Iowa, Kansas, Massachusetts, New York, Virginia, Nebraska, and Illinois. In some instances these bureaus have been organized by legislation; in other cases no legislative action has been regarded necessary. Legislative reference and drafting bureaus provided by statute and emphasizing drafting as well as library and reference work have been established in Michigan, Ohio, Pennsylvania, South Dakota, Texas, Wisconsin, California, Vermont, and Indiana. Bureaus have been created by statute for drafting work only in New York, Connecticut, and Massachusetts.

The duties and responsibilities placed upon the librarians

[1] From article by John R. Commons, *Review of Reviews*, vol. xxxii, pp. 722 ff.

of such bureaus may be illustrated by an extract from the Michigan act of 1907:

He shall procure and compile in suitable and convenient form for ready reference and access, information as to proposed and pending legislation in other states and shall also investigate the operation and effect of new legislation in other states and countries, to the end that either house of the legislature or any committee or member thereof, or any citizen of the state, may have the fullest information thereon. He shall also give such advice and assistance to the members of the legislature as they may require in the preparation of bills and resolutions, and shall draft bills upon such subjects as they may desire.

The ordinary duty of such bureaus involves:

The collecting, classifying, digesting, and indexing of data of all sorts bearing upon legislation so as to make it effectively serviceable to members of the legislature and others. This material includes not only books and pamphlets such as are available in an ordinary library, but, in addition, bills introduced in the various state legislatures and separate copies of laws enacted by them or by foreign parliaments, magazine articles and newspaper clippings, separately mounted lists of references and digests (printed, multigraphed, or typewritten), and sometimes letters containing opinions of specialists, all of this material being closely classified by subject on shelves, in pamphlet boxes, or in vertical files, for quick reference when inquiry is made involving its use. The principal object is to furnish reliable information as to the laws on any subject enacted or proposed in other states and countries and whatever information is available regarding the interpretation and administration of those actually in operation, statistical and other printed data, showing the economic conditions which have to be taken into account in the preparation of legislation, as well as public opinion, popular discussion, and the views of experts who have given special attention to various questions of legislation.[1]

Bill-drafting Bureaus.[2]—A number of states have made provisions for some method of securing expert assistance

[1] From report of the Special Committee on Legislative Drafting of the American Bar Association, p. 9. For an interesting account of the work of legislative reference bureaus, see articles by Finley F. Bell, "A Legislative Aid: The Work and Functions of the Legislative Reference Bureau of Illinois," and Arthur P. Will, "The Development and Functions of Legislative Bureaus," *Case and Comment*, January, 1917.

[2] *Cf.* C. L. Jones, *Statute Law Making in the United States* (Boston Book Company, 1912), part ii, "The Drafting of Bills."

in the drafting of bills. For example, in New York the president of the Senate and the Speaker of the Assembly were authorized to appoint three persons whose duties during the session of the legislature should be "to draft bills, examine and revise proposed bills, and advise as to the consistency or other effect of proposed legislation." In Massachusetts provision for bill-drafting is made by each branch of the legislature. California established in 1913 a Legislative Counsel Bureau to be in charge of a chief appointed by a board consisting of the Governor and two members each from the Senate and Assembly. The chief of the bureau is to be a specialist in the laws of the state, and is expected to prepare and assist in the preparation of amendments to legislative bills. A bill-drafting bureau is one of the necessary adjuncts for efficient lawmaking. To render its best service, the bureau, as well as the legislature itself, must have at command a well-equipped legislative reference division.

To aid in the process of draftsmanship a committee of the American Bar Association has been authorized to prepare a representative manual or code with a collection of directions and suggestions to draftsmen and with model clauses for constantly recurring statutory provisions. It is hoped by this committee and others interested that a real science of legislation may be developed, and that legislation may grow into a system of principles just as the common law has developed.[1] A beginning has been made in this direction in the issuance of a tentative manual prepared by the committee. The general conclusions of those who conducted the investigation for the American Bar Association were:

> It appears from this study that for the establishment of an efficient agency, under state auspices, for rendering expert assistance to members of the legislature, both a legislative reference department and a bill-drafting service are required; that the best results are likely to be

[1] *Cf.* Ernst Freund, *Standards of American Legislation* (University of Chicago Press, 1917).

obtained when these are located in close proximity to one another, to a law library and collection of public documents, and to both legislative chambers, and that they should be under a single director. The legislative reference work should be under the direction of a man having a liberal education, particularly in political and economic science, together with some interest and experience in library affairs. (The salaries paid in the various bureaus range from $3,000 to $5,000 per annum.) This department should be permanent and its services available throughout the year for all departments of the state government, for municipalities and organizations and the public generally. It is doubtful whether it should be generally organized as part of the state library, if such an institution exists. The separation of the legislative reference bureau from the administrative control of the state library, shown in Indiana and Pennsylvania, is likely to occur elsewhere as soon as the bureau is well established, unless the state librarian is primarily a legislative librarian (as in Connecticut, Massachusetts, and Rhode Island), because its aims and methods differ so markedly from those of a general library. This is particularly true where the bureau includes a bill-drafting department. The same tendency is shown also in bills now pending in the California legislature to separate the legislative reference department from the state library. The draftsmen should, as a general rule, be men who have had legal training and experience, with a sufficiently broad outlook to recognize the importance of the comparative study of laws in other jurisdictions, and that economic and political data are frequently as important as court decisions and existing statutes in the framing of new legislation. The chief draftsman should be a permanent official, employed, if possible, all the year round, and devoting his whole time to the duties of his office, but at least he should be employed for two or three months prior to the assembling of the legislature, as well as during the session. (The salaries paid to chief draftsmen are at the rate of from $3,000 to $5,000 a year.) The additional draftsmen and such stenographic and clerical assistance as may be required should be employed, during the session at least, from a lump-sum appropriation, so that the number may be varied to meet the needs of the service from time to time, because it is found that the amount of work to be done by the drafting department is very much greater in the first part of the session than later.

It is very essential that both branches of the reference and drafting service should be nonpartisan, and that directors and assistants should be chosen solely on the ground of fitness. The method of appointment and administrative control best calculated to achieve this result will largely depend on the political conditions existing in each state, the particular state institutions, boards, or commissions to which these services might satisfactorily be attached, in the first instance, at least,

and the attitude of the members of the legislature in the matter of control of the drafting and revision of bills.

In order that the chief draftsman may be permanently employed it would probably be necessary, particularly in those states where the legislature meets biennially, to assign to him additional duties for the period between sessions. It is suggested that the indexing and publication of the session laws might, with advantage, be done under his direction, and that he might be also the reviser of statutes (or ex-officio member of any commission appointed for this purpose) and one of the commissioners on uniform state laws.[1]

The Advisability of Changing the Present Form of Legislative Organization.—Another problem of increasing importance is the question as to the advisability of changing the existing form of legislative organization. The bicameral principle was originally adopted in England, owing to the peculiar conditions by which different classes or estates were given representation. And when representative bodies were formed, the upper classes or estates were accorded special recognition in an upper house, and the other classes of freemen combined to select representatives to a lower house. The bicameral principle has been adopted throughout Europe, except in Greece, Luxemburg, and a few of the smaller German states, and in the Americas, except in the provinces of the Canadian Dominion. With the disappearance of the class basis on which the double chamber was originally founded, the upper houses have been formed on an artificial basis of the representation of interests. With the extension of the principles of popular government and the decline in public esteem of the upper house, the movement for its abolition is gaining headway everywhere. "The uniform experience of Europe certainly indicates that upper chambers tend either to sink into positions of insignificance or to become effective checks upon the action of the more popular body. . . . They are everywhere either a nullity or a menace."[2]

[1] From Appendix B, Report to the committee on existing agencies for rendering expert assistance to members of legislatures, by J. David Thompson, pp. 27–28.

[2] W. J. Shepard, in *Cyclopædia of American Government*, vol. ii, pp. 339–341.

The lower houses are supposed to represent the popular will, and the tendency is to grant more power to the representatives of the people. In federal government alone is there a natural basis for two chambers in the representation of states and of individual electors. The colonies in America, with few exceptions, adopted the plan of having two houses, the one representative of the colonists, and the other of the British Crown. When the first state constitutions were framed, it was to be expected that they would follow the precedent already well established of having two houses. Although the Articles of Confederation provided for a single house the analogy of the English government and the desire to have state as well as individual representation led the makers of the Federal constitution to adopt the bicameral plan. However natural it was to have the legislatures of state and nation established on a bicameral basis, the present ineffectiveness and cumbersomeness of legislative procedure, the general lack of responsible action, and the failure of one body to act as a check upon the other in hasty or undesirable legislation have led to no little discussion of the advisability of discarding the bicameral system in favor of a unicameral legislature. A few attempts have been made to accomplish the change through constitutional amendments, as in Oregon in 1912 and 1914, in Oklahoma in 1914, and in Arizona in 1916. The attempts, however, have been unsuccessful so far, although the large vote favorable to its adoption in Oklahoma shows the trend toward its probable acceptability.

Governor Hodges of Kansas, in 1913, in his message to the legislature, favored in a rather extreme proposal the adoption of the unicameral system. In his message, he said:

> Two years ago I suggested a single legislative assembly of thirty members from thirty legislative districts. I am now inclined to believe that this number is too large, and that a legislative assembly of one, or at most two, from each congressional district would be amply large.

My judgment is that the Governor should be ex-officio a member and presiding officer of this assembly, and that it should be permitted to meet in such frequent and regular or adjourned sessions as the exigencies of the public business may demand; that their terms of office be for four or six years and that they be paid salaries sufficient to justify them in devoting their entire time to the public business.[1]

Governor Hodges' suggestion proved too extreme, and although it occasioned much discussion it has not been favorably received. The plan submitted in Oregon in 1912 provided for a single house, of which the Governor and the minority candidates for the Governorship should be members with voting power proportionate to the votes they received as candidates. The movement for unicameral legislative bodies is thus summarized in the Illinois constitutional convention bulletin:

In the United States and in the Australian Commonwealth all of the states have two-chambered legislatures. In Argentina the majority of the provinces (which correspond to our states) have the two-chambered system, but the others have single-chambered legislative bodies. In Germany before the war fifteen of the twenty-five states had single-chambered legislatures and most of the individual states of the Latin-American federations have but a single chamber. All the cantons of Switzerland which operate under the representative system have single-chambered bodies. In the Dominion of Canada only two of the nine provinces have two-chambered legislatures; and some countries which have two-chambered legislatures have such a relationship between the powers of the two legislative bodies that they practically amount to a single chamber. Since the Civil War there has been a decided tendency in all larger cities away from the two-chambered council, and the single-chambered legislative body for cities has pretty distinctly worked in a more satisfactory manner.[2]

The problem of the two-chambered legislature has been actively discussed in Great Britain and in other countries having a parliamentary system under which the government is managed by a Cabinet who are responsible to a popularly elected legislative body, and who resign when they lose the support of that body. It will be seen that the

[1] Quoted in *Illinois Constitutional Convention Bulletin*, No. 8, p. 528.
[2] *Ibid.*, pp. 530–531.

responsibility of such a governing group to two legislative bodies, each of which may be controlled at a particular time by different interests, would present difficulties. The tendency in all countries under a parliamentary system has been distinctly toward making the Cabinet, as a governing group, responsible to the larger and more popular of the two legislative bodies. This means that the other house has little influence upon measures of a political character.

The experience of countries in which the single chamber has proved successful, along with the general criticism of our legislatures, has led to a movement for reform which argues for the single-chamber legislative body. Practically all of the advantages in favor of the bicameral system can be secured, it is contended, through a unicameral body. The arguments in favor of the bicameral system were that greater consideration would be given public measures, that evils and defects would be discovered through delay and further consideration, and that the two houses would result in a representation of the minority in the Senate and in a representation of the people, as a whole, in the lower house. It is seriously questioned, however, to-day whether the system of two houses has prevented hasty legislation, whether it has resulted in more care and consideration of measures, and, furthermore, whether it is advisable to have classes represented in legislative bodies.

The defects of American legislative bodies which have become only too well known and which have called forth much deserved criticism and condemnation ought not to lead us to forget the large contributions to social and industrial reform which state and Federal legislative bodies have made during the last century. The many experiment stations, as James Bryce characterized our state governments, have been trying out all kinds of political and social reform. Out of failures have often evolved successful forms of organization or methods of administration which, when their efficacy was demonstrated in one state, have finally been adopted in other commonwealths. Bungling and

cumbersome as many legislative methods seem, they have often produced results worthy of commendation. It is perhaps true, as has been suggested, that the English-speaking people can secure good government through poor political machinery. At any rate, the positive contributions of American legislative bodies add an interesting chapter to the evolution of social and political reform, an account of which does not fall within the scope of this volume. It remains to be determined whether a type of political machinery designed for the more simple and primitive conditions of a century ago can be made to function effectively under the complex conditions of to-day or whether the radical social and economic changes of a century require gradual political reorganization.

SUPPLEMENTARY READINGS

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CHAPTER V

PROBLEMS OF EXECUTIVE ORGANIZATION AND ADMINISTRATIVE METHODS

Definition and Scope of Administration

The term *administration* has been used in three different and rather distinct senses to designate, first, all of the powers and duties concerned with the execution of public policies; second, the exercise of these powers and duties; and, third, the body of officials or administrative personnel.[1] The term is used more frequently in either the second or third meaning—that is, as to whether the emphasis is placed upon functions or upon the organization and personnel of the administrative branches of the government. European nations have given more definite meaning and significance to administration as a distinct branch of the government.

The matters which have to do with the laws, rules, and regulations of government are of such significance in modern governments that the administration has been designated a separate branch of government.[2] Administration as distinct from legislation involves, as Mr. Willoughby indicates,

1. Problems of organization.
2. Problems of personnel.
3. Problems of material.
4. Problems of business practice and procedure.

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[1] See J. M. Mathews, *Principles of State Administration* (D. Appleton & Co., 1917), p. 3.

[2] *Cf.* W. F. Willoughby, *The Government of Modern States* (The Century Company, 1919), chap. xvi, p. 385.

The persons in charge of the execution of public policies are required, first, to

> . . . determine the structural character or organization of the service or services by means of which the work of administration is to be performed. Secondly, they must make provision for the manning of this organization with a personnel and the determination of the conditions under which such personnel will give their services. Thirdly, they must provide for the material equipment required by this organization for the performance of its duties or fix the condition under which such material will be acquired. And, finally, decision has to be reached regarding the methods that will be employed in operating the services. These are all, it will be seen, matters purely of business administration.[1]

Where the distinction has been recognized between the policy-forming and the administrative agencies of government, it has been found necessary to subject the administration to control by the popular or policy-determining bodies. The different forms of control adopted are the popular or political control, the legislative, and the judicial. Popular control is always exercised to some extent through these agencies of public opinion. But popular control is rendered effective where provisions of constitutions or legislative acts, or both, are submitted to the electorate for approval. Where the offices are filled by election administrative officers are always subservient to public demands. Both the control and the supervision of the administration in the United States are exercised to a large extent by the legislature. But as the legislature cannot exercise this control in any direct and specific manner, it is necessary to provide within the administration itself methods of checking and supervising by means of accounts and reports so as to keep in constant touch with the work performed by those who have the immediate duty of putting laws into effect. The prime reason for the differences in the development of the practice and technic of administration is to

[1] W. F. Willoughby, *The Government of Modern States* (The Century Company, 1919), p. 391.

be found in the application of diverse theories as to the division of public powers.

Politics and Administration

A somewhat artificial separation of powers into legislative, executive, and judicial branches in the government of the United States and an effort to establish a system of checks and balances by setting one department against the others have tended to distract attention from the time-honored grouping of public functions into two great divisions: first, the function of the formation of public policies, and, second, the function of the execution of these policies. In European governments the two functions are rather clearly defined under the terms *politics* and *administration*. The term *politics* is understood to mean the formation of public policies. In this formation the influence of public opinion holds sway; elections and political campaigns result in the victory of one policy over another and in the carrying out of the party programs and the determination of general principles of public management. The term *administration* is understood to include the execution of these policies and the formulation of those rules and regulations by which the policies may be effectively enforced. The administration comprises the officers and personnel of the executive and judicial branches of the government and includes the laws and regulations under which these officers perform their functions.

In politics, all the elements of human nature are at work, and the necessary complexity of the factors involved makes it often a matter of chance as to what policy may be temporarily adopted. While the motives and the forces of public opinion and the conduct of the electorate may be analyzed much more completely and systematically than has yet been done, there will always be a large element of uncertainty in the determination of public policies through the avenues of public opinion, elections, and legislative

chambers. Administration, on the other hand, in many of its branches requires that specialization and technic which the man of experience and training alone possesses. For this reason European nations have long required a thorough training in secondary school, college, and university for those who enter the permanent administrative service. And by a system of probation, promotion through meritorious work, and permanence of tenure they have developed government administration into a science calling for and giving opportunities to many of their best and ablest citizens.

In the United States, the policy-determining and policy-executing functions have been confused under the general term politics. Administration separated from politics has not come into general use. The failure to distinguish between these two functions and to recognize that the one, politics, necessarily involves all of the play of human interests and emotions, and that the other calls for training, experience, and the development of a scientific technic, has retarded the acceptance of the merit principle and the development of a permanent tenure in government service.

On account of this difference in division of powers, the function of administration on the Continent is much more important than it is in England or in the United States. Administrative officers have a larger sphere of discretionary action. The officers who do this work are more competent, because, as a rule, greater attention is given to their education for the important duties which they discharge, and greater care has been taken to make their positions permanent in character. The Anglo-American system of administration is decentralized in character in the sense that locally elected officers administer local laws under the supervision and control of an independent judiciary. The continental administrative system is highly centralized in the sense that centrally appointed officers execute the instructions of administrative superiors and are to a large extent independent of judicial control. During the nine-

teenth century the Anglo-American system has tended toward centralization, and the continental system toward decentralization, the two approaching in the direction of a single general plan. The tendency toward centralization is quite marked in the American state governments in the establishment of boards, bureaus, and commissions with supervisory functions in many instances over local officers and subordinate units of government. Finally, centralization of all of these boards into a Governor's Cabinet and the concentration of executive authority are distinct tendencies in state governments. The same centralization has been established from the beginning in the Federal government. Continental governments have tried, on the other hand, to grant a greater degree of independence to local officers. It is still true, however, that Anglo-American administration is decentralized, whereas continental European administration is centralized.

Executive Powers and Functions[1]

The primary function of the executive of a nation is to supervise and direct the administration of its laws. It is sometimes suggested that it is the function of the legislature to formulate the will of the nation and of the executive to carry out the policies thus formulated. But normally, the duties of the executive involve much more than the enforcement of legislative policies. The chief duties of the executive may be stated briefly as follows: To act as head of the government and to represent the government in its relations with other countries; to appoint and remove officers, mostly in the higher branches of the public service; to act as commander-in-chief of the military forces of the government; to grant reprieves and pardons; in certain cases, to approve or disapprove acts of the legislature;

[1] See especially W. F. Willoughby, *The Government of Modern States* (The Century Company, 1919), chap. xiv, and F. J. Goodnow, *Principles of Constitutional Government* (Harper & Brothers, 1916), chaps. viii and ix.

sometimes to summon and adjourn its sessions; and generally to supervise the enforcement of the laws.

In the performance of these duties it is often necessary for the executive to exercise his discretion and use judgment as to the scope and the methods of law enforcement. For this reason, much depends upon the personal views of the executive as to what laws will be effectively enforced. Laws sometimes remain on the statute book for years, with little or no effect, until some vigorous type of executive or one to whom the laws make a special appeal proceed to enforce them. For example, it is generally conceded that, owing largely to the personal views of two Presidents, the Sherman Anti-Trust Act was not enforced for a period of eight years; and it is a fact that numerous restrictive and prohibitive liquor laws have not been enforced when clemency or nonenforcement appeared to accord with the popular will. Personality and individual views enter into the execution of the laws to such a large extent that much more consideration should be given to the rôle of discretion and to the individual judgments of executive officers. In addition to the exercise of judgment and discretion in the enforcement of laws, it is likewise regarded as part of the executive function to formulate constructive policies and in a measure to direct the public life of the state. Everywhere may be seen a tendency to increase the responsibility of executive officers and to enlarge their functions. Owing to the necessity for prompt and effective action, the executive authority rests in a single person in every nation except Switzerland, where it is placed in a committee of seven. Though there is a noteworthy resemblance in the ordinary powers and functions allotted to the executives of the various countries, there is a fundamental difference between the European and the American conceptions of the executive power. This difference involves one of the foremost problems of executive organization.

The European Doctrine of Executive Power.—The idea of executive power in European countries differs materially

from the notion prevalent in the United States. Though certain powers such as those of military command, of appointment of officers, and of the granting of pardons are quite similar in all countries, the practical methods of exercising such powers vary considerably. The European executive is not personally responsible for his official acts, the responsibility resting upon the Minister who countersigns all public acts. Moreover, the heads of executive departments are granted the power to issue rules and regulations in the form of ordinances which have the force of law. Thus, in large part, the details of administration are left directly in charge of executive officers. European executives are also accorded the right to dissolve the legislative chambers, to initiate legislative measures, and, through Cabinet officers, to participate actively in the legislative process. Owing to the responsibility of the executive to his Cabinet and of the Cabinet to the lower house, it has been found unnecessary to define the limits of the executive powers, because they are invariably subject to the control of Parliament. Legislation is ordinarily confined to the formulation of general rules and principles which are carried into effect by executive ordinances on the Continent and by provisional orders in England.

The American Doctrine of Executive Power.—The American idea of executive power was largely influenced by Montesquieu's theory, which involved the separation of powers into legislative, executive, and judicial, and which required that each one of the authorities was to be independent of the others. Despite the fact that Montesquieu misinterpreted the English system of government (from which he professed to derive his theory) and that the principle of separation into three powers has never been accepted in England or France, nevertheless, the theory was made a part of the public law of the United States. And the well-defined distribution of government activities between the three branches, each of which has a certain realm of independent powers and duties, is the first prin-

ciple of the organization of public powers in the United States. But in the application of this theory it was early determined that the legislature should specify in detail the powers to be exercised by the executive. "Each officer is within the law to act in accordance with his own views of what is right and proper. The allegiance and responsibility of each officer are to the law and not to some administrative superior."[1] The legislature becomes the creator and regulator of the administration. Thus was initiated the American notion of a government of laws and not of men.

Beginning with the constitutions of 1776, it was generally provided in the United States that executive powers should be clearly defined and enumerated. The person in whom executive power was vested was to exercise only the functions thus specifically defined. Owing to the many conflicts with colonial governors, it was thought best in framing state constitutions not to create a strong executive. The executive was therefore denied both the power of prorogation or dissolution of the legislative assembly and that of formally initiating laws, and was granted limited powers of appointment which were to be exercised only with the approval of the Senate. Furthermore, the ordinance-making power which executives in European countries almost invariably possess was likewise not regarded as included among executive powers. The general result of these principles has been described by President Wilson:

> Our laws abound in the most minute administrative details, prescribe the duties of executive officers and the methods by which statutes are to be put into practice with the utmost particularity, and all the reins of government seem to have fallen to those who were once only its censors.[2]

According to the European theory, the function of the legislature is very much prescribed, owing to its restriction

[1] F. J. Goodnow, *Principles of Administrative Law in the United States* (Students' Edition), (G. P. Putnam's Sons, 1903), pp. 44–45.

[2] Woodrow Wilson, *Constitutional Government in the United States* (The Columbia University Press, 1909), p. 15.

to the formulation of policies, whereas the function of the executive is much extended, owing to the necessity of the executive's attending to the details of legislation in addition to the ordinary executive powers. The legislature in America exercises much more extensive powers, in that it becomes its duty to prescribe practically all of the details of executive functions. Consequently, the executive power is narrowed in scope and circumscribed by minute regulations defined in legislative acts. In Europe recent developments have tended to enlarge the legislative control over departments, and in the United States numerous exceptions have been recognized by which executive officers or boards are accorded rule-making authority. It is evident that legislatures are relinquishing some of their control over administrative details. The two doctrines appear, then, to be converging toward a clearer differentiation of the true functions of the executive and the legislative departments. Nevertheless, the separation of administration and legislation so as to secure efficient government and to preserve satisfactory public control remains in a measure an unsolved problem in Europe and America.

Principles of Executive Organization in the United States

Two different principles are followed in organizing executive power in the United States. The powers of the president, as well as his important duties as director of the Federal administration, have been discussed in a previous chapter. It was there found that the Federal government concentrates authority in the hands of a single executive officer. The executive authority in the states, however, is distributed among a number of elective and appointive officers, each of whom is largely independent and uncontrolled in the administration of his separate department.

The result is that the Governor is not the head of the state administration in the sense that the President of the United States is the head

of the national administration. He has no general power to remove, direct, or discipline officers elected by the people. In the administration of the particular branches of affairs intrusted to them, they are independent of the Governor as of each other, and owe no responsibility to him. His power of supervision over the administration, where he has any at all, is limited to the right of examination into the condition of the administration of their offices, and sometimes of removing them for gross negligence, corruption, or misfeasance.[1]

State Administrative Organization.—Though the Governor is granted about the same general powers as the President, such as the power of commander-in-chief, legislative powers of message and veto, and the pardoning power, his administrative powers, which have to do with appointments, removals, and the control of the administration, are much more restricted. With the exception of a few states in which the executive department has been reorganized, the Governor is not the head of the administration services of the state.

The position of the Governor has been influenced by the fact that many of the important state offices have been made elective, and thus they have been rendered independent of the Chief Executive. Also, the establishment of numerous boards, bureaus, and commissions with independent powers has tended to break up into minute divisions the administrative authority which in the Federal government is concentrated in the President.

The chief power of the Governor is to be found in the general provision which authorizes him to see that the laws are faithfully executed. This power has been greatly restricted by the rule which has been adopted everywhere in the United States to the effect that the Governor cannot enforce laws unless specific provision is made therefor in the constitution or statutes. Consequently, the execution of the laws is, for the most part, in the hands of officers over whom the Governor has little or no control. The administrative powers of the Governor are exercised through

[1] See J. W. Garner, in the *Cyclopædia of American Government* (D. Appleton & Co., 1914), vol. i, p. 683.

appointment, through supervision, and through suspension or removal. The appointive power of the Governor, although quite extensive, is limited by the fact that the most important department heads are elected by popular vote, and thus the Governor exercises very little control over these offices. His appointive power applies largely to administrative boards and commissions, and it is through his authority over these that he has secured a greater influence in the matter of administrative control. Furthermore, the Governor has no legal powers of supervision over state or local officers unless specific provision is made by statute. The authority of the Governor is exercised over such officials by means of requests for information and by the authority to inquire into all phases of the government and to make public his findings. With respect to the power of removal, the Governor also has no general power, and it is only when provision is made by a constitution or statute that he may remove state officers. The lack of the power of removal and of the right to control executive officers is the chief reason why the executive branch of state government has been less effective than that of the Federal system. It is generally stipulated that the Governor may not remove without reasonable notice, without any charge or specification, and without any opportunity being given to the officer to make his defense.[1]

The problem in state governments which is now receiving most attention is the creation of a real executive with control over both removals and appointments, with supervision of and responsibility for the preparation of the budget, and with a directive control over administrative departments.

Steps Toward Reorganization of State Administration.[2]—The difficulties and problems involved in the organization

[1] J. M. Mathews, *Principles of State Administration* (D. Appleton & Co., 1917), p. 108.

[2] The problems of administrative reorganization in relation to the budget are considered in part iv, chap. i.

For a brief summary of the progress toward administrative reorganization *cf.* C. G. Haines, "The Movement for the Reorganization of State Administration," *University of Texas Bulletin*, No. 1,848, June, 1920.

of the executive departments of the state have recently led to a general movement for reorganization. In order to adjust a form of government planned for the more primitive conditions of many years ago so that the multitudinous functions which now devolve upon state governments may be performed, it has been found necessary to establish numerous boards, bureaus, commissions, and commissioners. Owing to the fact that these boards and bureaus have been created one at a time as occasion arose and have been constituted as independent agencies with specially designated powers, state administration has been lacking in the unity and correlation necessary to secure economical and efficient public service. The organization of state administration contains to-day "little evidence of unified design or systematic planning. It consists of a complicated mass of separate and disjointed authorities, operating with little reference to one another or to any central control."[1] Lack of unity and of correlation in the arrangements for state administration has led to dissatisfaction and criticisms which have resulted in a significant movement for reform.

The first step in most states has been the appointment of a committee to investigate existing conditions and to recommend constructive measures. Most of these committees have been designated as commissions on Efficiency and Economy. A majority of the commissions have recommended the reform of administrative methods, and a few have proposed a complete reorganization of state administrative agencies. Primarily, the recommendations aim to secure "greater concentration of power and responsibility through the consolidation of the numerous state bureaus, departments, boards, and commissions."

New Jersey was the first to provide for a special commission to investigate and to report on the administrative agencies of the state. Comprehensive investigations of the

[1] J. M. Mathews, *Principles of State Administration* (D. Appleton & Co., 1917), p. 499.

organization of the administrative agencies of state government were inaugurated in Minnesota and Iowa in 1913. Two years later, the New York Bureau of Municipal Research made an exhaustive study of the organization of the government of New York State and suggested a plan for consolidation and reorganization. The constitution, which embodies many of the recommendations of the bureau, was defeated at the polls; and the suggestions for reorganization by the commissions of Minnesota and Iowa were not accepted by the legislatures of these states. Nevertheless, these preliminary studies served as a guide to the Illinois commission, whose recommendations for consolidation were the first to be carried into execution.

Three different methods have been employed in the conduct of the investigations. The first and, until quite recently, the most common method was to authorize the appointment of a special committee composed of members from the two legislative chambers, and this committee through a series of subcommittees conducted the inquiries, held hearings, and gathered and collected evidence. A second method of procedure has been the appointment of an official commission usually composed either of executive officers or of members of the legislature and a certain number of appointed members. It is assumed that the latter will bring to the investigation special ability and qualifications, and by devoting their entire energies to the task will render the investigation more thorough and complete. This method of combining the official point of view with that of interested outside parties is now frequently adopted in place of the former legislative investigating committees. A third method takes this procedure a step farther by authorizing an official committee to employ specialists and to place in charge of such specialists the conduct of investigations. This plan was followed in Illinois and in Oregon and bids fair to replace the other two methods, thereby introducing into the administrative branch of the government a practice which will transform such adminis-

tration, just as the management of business establishments has been transformed, through the employment of experts.

Reorganization in Illinois.[1]—The best illustration of the method involving the employment of specialists is to be found in the movement for reorganization in the state of Illinois. Extensive use has been made in other states of the thorough investigations and the constructive recommendations prepared by the Illinois commission. In Illinois, the legislature of 1913 provided for the appointment of a Committee on Efficiency and Economy, and gave the committee full power to investigate all departments and agencies of the state government. Under the direction of the committee specialists made a survey of all of the agencies of state administration and prepared tentative plans for consolidation.

As a result of its investigations, the Illinois committee found that a condition of disorganization and confusion existed in the executive departments of the state government which necessarily produced inefficiency and waste in the state services.

The main points in the indictment may be briefly summarized:

> There is unnecessary duplication of positions and salaries; not only in the chief officers of each separate bureau or board, but still more in their staffs of clerks and employees. But this is the smallest part of the loss. The work that is undertaken is not well done and costs much more for the results obtained than with a more efficient organization. Supplies in many cases are purchased in small quantities for each office or institution, which could be secured at lower prices if purchased in larger quantities on contracts based on competitive bids, as is done by the board of administration for the charitable institutions. The absence of definite correlation and co-operation between the most closely related offices, necessarily leads to loss and inefficient work. The only supervision provided by law over most of the executive offices, boards, and commissions burdens the Governor with a mass of unnecessary detail which no single individual can effectively handle,

[1] See *Report of the Efficiency and Economy Committee* (Illinois), 1915; for a brief account, consult J. M. Mathews' "Administrative Reorganization in Illinois," *Supplement to the National Municipal Review*, November, 1920.

and at the same time does not afford him either the time or the facilities for the proper determination of the more important questions of administrative and legislative policy. The present arrangements also fail to provide the General Assembly with adequate information or advice to enable it to perform its work wisely, either in making appropriations or in enacting substantive legislation. And while reports are made and published, they are so numerous and poorly organized that the general public fails to receive satisfactory information of the work that is done and has no satisfactory means for fixing responsibility or of discriminating between those officials who perform their work well and those who perform it poorly or not at all.[1]

In discussing these defects in detail, the committee observed that under existing arrangements inefficiency and waste necessarily arise from the lack of correlation and cooperation in the work of different offices and institutions which are carrying out similar or closely related functions. The committee concluded that "the compensation of state officers lacks any approach to uniformity on the basis of work done." As a result of the absence of any systematic organization of related services, there is no effective supervision and control over the various offices, boards, and commissions. One of the most serious defects arising from the lack of correlation and effective supervision over the subordinate authorities is found to be the absence of any satisfactory budget of estimates as a basis for appropriations.

Appropriations have been based in the main upon estimates and requests made by the head of each office, bureau, or board, most of which officials have not been charged with a sufficient degree of responsibility to make them careful and sparing in their requests. The General Assembly has been compelled to act upon these requests without sufficient time, means, or opportunity for adequate investigation. The result has been that unnecessary appropriations have been made in some cases; while in others needed funds for important public services have not been provided.[2]

As the result largely of the absence of a proper budgetary system, the accounts of the various state authorities are

[1] *Report of the Efficiency and Economy Committee* (Illinois), pp. 18–19.
[2] *Ibid.*, p. 22.

entirely inadequate. Finally, with the existing lack of efficient executive organization, both the Governor and the General Assembly fail to receive proper information and advice as to needed legislation. The committee continued:

No machinery has been provided by which the recommendations and proposals for legislation from the numerous lists of officers, boards, and commissions can be carefully weighed and sifted by officials charged with responsibility over a large field of administration. Conflicting measures are often proposed by different state authorities; and many proposals are presented from outside sources both on subjects within and without the jurisdiction of existing executive officials. As a result, there is no harmonious legislative policy even formulated; and the measures enacted not only lack coherence, but at times acts are passed at the same session which contain directly contradictory provisions. There is clear need for an executive organization which will make possible a well-defined administration program of legislation.[1]

Another result of the present methods of legislation has been the creation of many new and independent departments, at an increased expense to the state, where, in many cases, the work might have been more efficiently and economically performed in connection with some existing agency.

Finally, under the present arrangements, while the general public is deluged with printed reports, it fails to receive reliable information in digestible form as to the conduct of the state administration, and is unable to locate definite responsibility for negligence or misconduct in public business.

The proposed plan of reorganization provided for the consolidation of the administrative agencies under ten departments. Bills to carry the recommendations into effect were prepared by the committee and submitted to the legislature with its report. The legislature to which the report was submitted took no action. But two years later, under the leadership of Governor Lowden, a more consistent and unified plan than that proposed

[1] *Report of the Efficiency and Economy Committee* (Illinois), p. 23.

by the committee was prepared and enacted into law under the title "Civil Administrative Code." The primary object of the new code was to reorganize and consolidate the numerous state administrative offices, boards, and commissions into a limited number of state departments, as in the national government of the United States. Nine main departments were created as follows:

1. Finance.
2. Agriculture.
3. Labor.
4. Mines and Minerals.
5. Public Works and Buildings.
6. Public Welfare.
7. Public Health.
8. Trade and Commerce.
9. Registration and Education.

These departments absorbed the functions of forty executive offices and fifty boards and commissions, as well as of a large number of subordinate positions. Each department has at its head a director who is authorized to make rules and regulations for his department and to fix salaries and define the duties of his subordinates. Officials in charge of important bureaus and divisions, as well as some administrative and a few unpaid advisory boards, are provided for in the code. All of these officials are appointed by the Governor with the consent of the Senate. The consolidation does not affect the elective officers provided for in the constitution.

While the principle that one man should have complete responsibility in the discharge of executive functions is recognized in the Administrative Code, it is also recognized that in the discharge of quasi-legislative or quasi-judicial functions it is essential to have the judgment of a number of men. Consequently, provisions were made for several boards or commissions for the administration of such departments. Where questions of policy are to be determined in the administrative departments, arrange-

ments have also been made for the appointment of advisory boards.

The principal results to be expected from this reorganization were pointed out in the report of the efficiency and economy committee. In the first place, there is more definite responsibility—likewise, increased efficiency resulting from the co-ordination and correlation of the numerous branches of state administration in the nine main departments and from the active supervision of the directors of these departments by the Governor. Of special importance are the consolidation of the state correctional institutions and that of the state normal schools, each organization being under a single authority. The new organization aids in securing more consistent and more effective legislation, and prevents the creation of additional and useless officials and boards. According to the judgment of Governor Lowden, the Civil Administrative Code

> . . . has more than justified all expectations that were formed concerning it. The functions of the government are discharged at the Capitol. The Governor is in daily contact with his administration in all its activities. Unity and harmony of administration have been allowed, and vigor and energy of administration enhanced.

Reorganization in Idaho.—The second state to provide for complete administrative consolidation was Idaho. By an act known as "The Administration Consolidation Act," which went into effect on March 31, 1919, all of the administrative agencies of the state except those created by the constitution were combined into new departments as follows:

1. Agriculture.
2. Commerce and Industry.
3. Finance.
4. Immigration, Labor, and Statistics.
5. Law Enforcement.
6. Public Investments.
7. Public Welfare.
8. Public Works.
9. Reclamation.

In accordance with the Consolidation Act, the duties and salaries of subordinate officials are fixed by the head of the department concerned, with the approval of the Governor. Since the Consolidation Act changed merely the agencies through which administrative duties are to be carried on, without corresponding changes in state law, the responsibility was placed by the act upon the Governor to "devise a practical working basis for co-operation and co-ordination of work, eliminating duplication and overlapping of functions." By means of the Consolidation Act more than forty offices, boards, commissions, and other administrative agencies were abolished. Governor D. W. Davis of Idaho thus characterizes the change introduced by the act:[1]

> This is the dawn of a new era in civil administration. As I have watched the workings of the new plan of the Cabinet form of centralized state government in Idaho, where fifty-one departments, boards, and bureaus have been put under nine heads, I am convinced of this. I have actually seen the enthusiasm, the exchange of ideas, the feeling of added responsibility, as I sat in the Cabinet meetings and have noted the difference between the old regime and the new, and I have come to believe the day past when the worn-out, creaking system of state government will do. That the red tape and costly duplication of the past is gone in Idaho is my firm belief.

Reorganization in Nebraska.—Nebraska, like other states, had a decentralized administrative system. There were numerous administrative agencies, each created by statute as the occasion arose and independent of other agencies, with powers and duties specifically enumerated by statute. A committee of the Nebraska legislature recommended in 1914 that a survey be made of the administrative services of the state in order to bring about consolidation and reorganization. The legislative efforts toward reform were supplemented by the interest and support of the Governor, with the result that consolidation, in so far as

[1] See "How Administrative Consolidation Is Working in Idaho," by D. W. Davis, *National Municipal Review*, vol. viii, p. 615.

the constitution of the state permits, was accomplished in 1919 by the passage of the Civil Administrative Code.[1] Under this Code, the following departments were created:

1. Finance.
2. Agriculture.
3. Labor.
4. Trade and Commerce.
5. Public Welfare.
6. Public Works.

Eight constitutional officers and four constitutional boards are retained, as are also the statutory boards of Equalization and Agriculture, each of which is made a part of the appropriate department. The object of the Code was to combine the statutory administrative agencies and to transfer their duties to one of the new departments. According to the language of the Code, the civil administration is vested in the Governor, who is aided in the administration of the laws by the heads of the six departments.

The heads of the departments are appointed by the Governor, and appointments to subordinate positions are made by the Governor in consultation with the head of the department concerned. In some respects, the Nebraska plan does not involve so complete centralization as that provided for in the codes of Illinois and Idaho, but in Nebraska an effort was made to codify the administrative law of the state and thereby to eliminate duplications and overlapping functions. In all three of the states which have attempted consolidation, a revision of the constitution will be necessary to complete the process and to do away with anomalies which hamper effective administration.

Reorganization in Massachusetts.—Massachusetts established a Commission on Economy and Efficiency in 1912, but little was accomplished in the direction of reorganization until a special committee of the legislature proposed, in 1917, a tentative plan of consolidation based on a study of the Illinois Code. This plan, which contemplated the re-

[1] *Session Laws*, chap. cxc.

tention of the elective constitutional officers, proposed to combine about two hundred independent agencies into eleven bureaus or departments. The constitutional convention which convened the next year failed to agree upon a consolidation plan, but submitted to the voters the proposition (which was carried) to the effect that, before January 1, 1921, the executive and administrative work of the commonwealth shall be organized into not more than twenty departments. In the legislative session of 1919, various plans for consolidation were considered, and these were finally combined into an Administrative Consolidation bill which has been enacted into law.[1] In addition to the constitutional departments of Secretary of the Commonwealth, Treasurer and Receiver-General, Auditor and Attorney General, sixteen departments were created.

Among the features of consolidation in Massachusetts are the concentration in the control of state purchases and the custody of state property, and the appointment of department chiefs and assistants by the Governor, usually with the consent of the council.

Numerous other states have taken steps in the direction of consolidation of administrative functions. The experience of New York illustrates the general trend and gives a suggestive summary of the reorganization movement. Reorganization was begun in New York by the appointment of a committee of inquiry, which made a few recommendations that were enacted into law. This preliminary work led to a plan to secure a description of the government of the state and appraisal of its work by the New York Bureau of Municipal Research preparatory to the calling of a constitutional convention. The report of the bureau with its recommendations represents a thorough analysis of state administration, with suggestions for reorganization which may be briefly presented as illustrative of the trend toward reorganization of state government.

[1] *Session Laws*, 1919, chap. cccl.

Plan of New York Bureau of Municipal Research.

I. An executive department with the Governor as the responsible head.
   1. A staff of permanent technical advisers constantly engaged in the scrutiny and review of the officers engaged in administration.
   2. A group of proprietary and legal officers in charge of the fiscal, property, and legal interests of the government.
   3. A group of departmental heads in charge of the several public-service divisions of the government, such as the labor department, the health department, the public works department, and so forth.

II. The legislature—presumably of one house, although this is not a necessary implication of the bureau program.
   1. A staff of permanent advisory agencies, such as the bill-drafting commission and the commissioner charged with the duty of indexing the statutes.
   2. The abolition or restriction of district representation and the adoption of some system of proportional representation.
   3. The restriction of local legislation by city and county home rule, thus confining legislative operations to matters of large state-wide public interest.

III. Executive and legislative relations.
   1. Power of the legislature to call the Governor and his Cabinet officers to the floor of the house and subject them to interpellations relative to administration.
   2. Power of the Governor and his Cabinet officers to appear on the floor of the house to propose, defend, and explain their proposals.
   3. Power and duty of the Governor to prepare the appropriation bill for all administrative (as distinguished from legislative and judicial) purposes, and restriction of the legislature to the right of elimination and reduction of items.
   4. Power of the Governor to dissolve the legislature and submit the issues at stake to the voters at a general election in which a Governor and legislature would be chosen.

IV. The organization of all administrative functions into a few related groups, each under a head appointed and removable by the Governor and manned by experts protected against the spoils system and surrounded by conditions relative to pay, promotion, welfare, and discipline conducive to efficiency.

In order to unify and systematize the various boards and commissions, the bureau proposed that the state adminis-

trative service should be organized into eleven departments.

It was provided in the plan of the bureau that heads of the departments were to be appointed by the Governor without the consent of the Senate, and that these were to hold office at his pleasure. Bureau and divisional chiefs were to be chosen by the respective departmental heads and were to have a permanent tenure based upon satisfactory and efficient service. The eleven departments were to be organized into a Governor's Cabinet, to which were to be added the Secretary of State and a Director of the Bureau of Administration. The latter was to be composed of a staff of technical experts to be at the disposal of the Governor for investigation, review, and report. Though the proposed plan of the bureau involves too great changes to be adopted as a whole by any state, various features of the plan have been enacted into law, and the tendencies toward reorganization are in the direction of the major proposals in the bureau plan.

General Principles of Reorganization Movement.—Extraordinarily large appropriation bills enacted by the legislature of New York led the Governor to appoint a nonpartisan body, known as a Reconstruction Commission, to prepare a report on retrenchment and reorganization in the government of the state.[1] In an elaborate report summarizing the facts and principles involved in the reconstruction movement, the commission proposed a detailed plan for the unification and consolidation of the various departments of the State of New York. The present state government is thus characterized:

> . . . a miscellaneous collection of 187 officers, boards, commissions, and other agencies. They are nearly all independent of one another and most of them are subject to no direct and effective supervision by a superior authority . . . the many-headed administrative structure of New York which scarcely deserves the name of organization has grown

[1] Introductory statement by the Governor to the Report on Reconstruction, New York, 1919.

up mainly as a result of haphazard methods of legislation by which new offices, boards, and agencies are created from year to year with little or no reference to existing authorities.[1]

In making this inquiry the commission found that in nearly every state public attention has been forcibly drawn to the necessity of reducing expenditures or at least holding them to the lowest point consistent with the proper discharge of public functions and fair conditions of employment. The commission found also that the movement for economy and efficiency had passed beyond the stage of protest and discussion. Examination of the laws creating commissions to investigate administration brings out the fact that waste and duplication inevitably accompany the maintenance of conflicting and competing offices and boards. The reports filed by the several commissions are in substantial agreement on the following points, according to the summary of the Reconstruction Commission:

1. State administration is a collection of offices, boards, and other agencies which have been created from time to time by legislative act without consideration being given to the desirability of grouping all related work in one department.

2. The board or commission type of organization for purely administrative work is generally inefficient, owing to the division of powers and absence of initiative and responsibility. This applies with less force to departments in which there are important quasi-judicial or quasi-legislative functions combined with administrative functions. Boards have been successful in many cases in carrying out advisory and inspectional functions and in the general supervision of education. *Ex-officio* boards are almost never effective.

3. Widely scattered and independent agencies of state government cannot be effectively supervised and controlled either by the legislature or the Governor.

4. When such a large number of agencies is independent of the Governor, he cannot be held responsible to the voters for an efficient and economical management of public business.[2]

The budget recommendations have passed beyond the theoretical stage, for a majority of the states have enacted

[1] *Report of Reconstruction Commission*, New York, p. 6. [2] *Ibid.*, p. 4.

legislation providing for a consolidated budget system, with varying provisions as to methods of preparation, legislative review, and enactment into law. Half of these states have placed squarely upon the Governor the responsibility for initiating the budget.

The recommendations with reference to the reorganization of boards, offices, and commissions have not been accepted by the state legislatures as readily as proposals for budget reform. The reasons are obvious. A consolidation of a hundred or more offices, boards, and other agencies affects political patronage more vitally than does a budget system, and it requires considerable courage and intelligence on the part of a legislature to reorganize an entire system of state government.

The general principles of the plans of administrative consolidation now in operation in a few states and proposed for many other states may be thus briefly summarized:

1. The consolidation of all administrative departments, commissions, offices, boards, and other agencies into a small number of departments, each headed by a single officer, except departments where quasi-legislative and quasi-judicial or inspectional and advisory functions require a board.

2. The adoption of the principle that the Governor is to be held responsible for the administration of the State and is to have the power to choose the heads of departments who are to constitute his Cabinet and who are to be held strictly accountable to him through his power to appoint and remove and through his leadership in budget preparation. This involves among other things the reduction in the number of elective administrative officers to two—the Governor, and a Comptroller to act as independent financial auditor.

3. The extension of the term of the Governor to four years and the careful adjustment of the terms of department heads with reference to the term of the Governor. Excepting members of boards with overlapping terms, department heads should have the same term as the Governor.

4. The grouping of related offices and work in each of the several departments into appropriate divisions and bureaus, responsibility for each branch of work to be centralized in an accountable chief.

5. A budget system vesting in the Governor the full responsibility for presenting to the Legislature each year a budget containing all

expenditures which in his opinion should be undertaken by the State, and a proposed plan for obtaining the necessary revenues—such a budget to represent the work of the Governor and his Cabinet. Incorporation of all appropriations based upon the budget in a single general appropriation bill.[1]

Undoubtedly some progress has been made in the unity and consolidation resulting from the new administrative codes. But a review of the movement for reorganization raises some pertinent problems. For example, will a consolidation accomplish very much which merely reclassifies the offices and places them under a few grand headings without changing substantially the relation of the Governor to his Cabinet and the relation of Cabinet officers to their subordinates, leaving to the legislature as heretofore the minute definition of duties and functions? The mere fact that the Federal government has ten departments with a more or less miscellaneous group of agencies under each does not assure efficiency in the Federal government. Again the inquiry is frequently raised in the consideration of the reorganization of administration, whether a closer connection between the Governor and his Cabinet and the Cabinet and legislature is not an imperative necessity if efficiency and economy are to be practiced in state administration. To this end not a few advocate for state governments the adoption of the primary features of the Cabinet system of England, which is also in operation in all of the self-governing colonies. That some form of closer co-operation between the legislative and executive departments is desirable all will agree, but how to accomplish such co-operation and not sacrifice principles regarded as indispensable is a leading issue. Finally, there are those who admit the advantages of unity and co-ordination among administrative departments but who fear the dangers involved in such a plan in case a Chief Executive is either inefficient or corrupt. They see in a system designed

[1] Condensed from Report of the Reconstruction Commission, New York, pp. 11–12.

to secure good results under strong executives a dangerous power which may be wielded so as to do incalculable harm. Hence, unless better arrangements are devised to dispose of corrupt and incompetent executives they believe administrative reorganization unwise which concentrates power into the hands of a single officer. It is pointed out in this connection that administrative concentration in city governments has worked well when reform administrations nave been elected, but that the return of corrupt and unprincipled political machines has merely given the politicians a better type of machine to foster their wily designs. It remains to be seen whether the results of administrative consolidation are such as to commend it to public support and to dispel the gloomy forebodings of those who give warning as to dangers ahead.[1]

Administrative Reorganization in Municipal Government.—Administrative reorganization in city government has been accomplished in several hundred cities under two forms of city charters known as the commission government and the city-manager plans. The commission form of government, first introduced in Galveston, has brought a virtual revolution in city-charter making.

The form of city government which developed in the United States in the early part of the nineteenth century, and which now largely prevails, is the mayor and council plan, which, in addition to the mayor, includes a council elected by wards and a number of independent administrative officials chosen either by popular vote or by the city council.[2] In 1901, Galveston, in order to meet the emergencies created by the flood, petitioned the legislature for authority to place the administration of city affairs in the hands of a small board of business men. The legislature complied with this request and created a commission of

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[1] *Prepare a chart of the present administrative organization of your state. Suggest a plan for administrative consolidation.*

[2] The number of cities with mayor and council form of government is approximately 10,300.

five members, three to be appointed by the Governor and two to be elected by the voters of the city. The appointment of city officers by state authority was held unconstitutional, with the result that the legislature amended the act in 1903 so that the other members of the Galveston commission could be chosen by popular vote. In 1905 Houston adopted a similar charter, and two years later the legislature of Iowa passed an act permitting any city in the state having a population of more than twenty-five thousand to adopt a commission type of government. Des Moines was the first city to adopt a charter under this act and the Des Moines plan has become a model for most of the later commission-government charters.

Features of Commission Government.—In brief, the plan provides for the concentration of all legislative and executive functions in a small board consisting of a mayor and four commissioners at large for a term of two years each. Under the Des Moines plan the business of the city is grouped into five departments: Public Affairs, Accounts and Finance, Public Safety, Streets and Public Improvements, Parks and Public Property. The commissioner who is elected mayor becomes *ex-officio* head of the department of Public Affairs while each of the other commissioners is assigned to the head of one of the other departments by majority vote of the council. All officials and employees in the department are appointed by the council as a whole. Provision is also made for the appointment of a board of three civil-service commissioners to have charge of the administration of the civil-service law. The Des Moines plan introduces also the initiative, referendum, and recall, which were not provided in the Galveston charter. Commission government has been established by four different methods—namely, by general commission government laws enacted by the legislature, by special legislative charters, optional charter laws, and home-rule charters.[1]

[1] The number of cities with commission form of government is approximately 400.

The main principles of commission government which are embodied in the new city charters are as follows:

1. The adoption of a city charter by the voters thus putting into effect the principle of home rule.
2. The entire city business is placed in the hands of a small board, usually from three to ten members, who exercise legislative, executive, and administrative functions.
3. Nominations and elections are generally to be held under an arrangement for nonpartisan ballots.
4. Wards are abolished and the members of the council are elected on a general ticket.
5. The mayor is usually denied the veto power.
6. Most of the charters provide for the initiative, referendum, and recall.
7. As a rule, provision is made for popular vote on public-service franchises.
8. The charters provide generally for publicity, open sessions, and monthly reports.
9. An improved method of accounting with uniform accounts, a regular system of auditing, and other devices to improve financial conditions are usually added.
10. Most of the charters provide for civil service for appointments to the subordinate positions.[1]

One of the conspicuous features with regard to commission government is that it involves a return to the concentration of power and responsibility, both as to executive and legislative matters into the hands of a small body such as was established in the council system under which the first cities in the United States were governed. Only a few cities have voted to return to the mayor and council form of government after having once adopted a commission charter. But certain defects in the plan of organization for commission-governed cities have been apparent from the beginning and have militated against the success of the plan in operation.

For example, commissioners are elected as representatives of the people and at the same time as directors of adminis-

[1] For a brief summary of the movement for commission government in American cities see *Bulletins for the Constitutional Convention*, Massachusetts, 1917–18, vol. i, no. 12, p. 451.

trative departments. An elected commissioner has to perform technical functions. Commission charters create, instead of a single executive, a five- or seven-headed executive. The chief defects, then, have been found to be the ignoring of the need of administrative experts and the lack of concentration of administrative power. Voters, it is claimed, can select men to determine policies or to act as a board of advisers, but cannot intelligently select heads of departments.

Owing to such weaknesses and certain unsatisfactory results from those elected to fill positions in commission-governed cities, it has been found necessary to adopt a new type of charter embodying more concentration of authority and greater responsibility. The general principles of successful administration for private affairs as well as for government service are now generally conceded to be:

1. For the administration of departments, a single administrator, with the concentration of power and responsibility directly placed in a single executive head.

2. To advise and determine policies, boards, or commissions acting as groups of advisers or directors.

3. Choosing of subordinates on a basis of merit, training, and efficient public service.

4. Popular control through the selection of a board or commission with general powers of legislation, or ordinance making, and of policy determining.

These principles have been incorporated into a new form of city government known as the commission-manager form of government.

Features of City-manager Type of Charter.—The features of the city-manager plan, or more recently known as the commission-manager plan, are a single elective board or commission supervisory and legislative in function, the members of which give only part time to municipal work and receive nominal salaries or none, and an appointive chief executive or city manager, selected by the board from anywhere in the country and holding office at the

pleasure of the board. The manager appoints and controls the remaining city employees subject, as a rule, to adequate civil service provisions.

The National Municipal League, through a committee appointed to prepare a model charter, has approved the city-manager plan in a suggested charter which has recently been adopted by the league and is recommended to cities throughout the country. This committee, comprised of specialists on municipal government from various sections of the United States, approved the city-manager feature as a valuable addition to the commission plan and recommended to charter makers serious consideration of the inclusion of this feature in the making of new charters. The committee summarized the advantages of the city-manager plan as follows:

1. It creates a single-headed administrator instead of the five separate administrators as in the Des Moines plan. This administrative unity makes for harmony between municipal departments, since all are subject to a common head.

2. The city-manager plan permits expertness in administration at the point where it is most valuable—namely, at the head.

3. It permits comparative permanence in the office of the chief executive, whereas in all plans involving elective executives long tenures are rare.

4. The city-manager plan permits the chief executives to migrate from city to city, inasmuch as the city manager need not be necessarily a resident of the city at the time of his appointment, and thus an experienced man can be summoned at an advanced salary from a similar post in another city.

5. The city-manager plan, while giving a single-headed administration, abolishes the one-man power seen in the old mayor-and-council plan. The manager has no independence and the city need not suffer from his personal whims or prejudices, since he is subject to instant correction, or even discharge, by the commission. Likewise, in the commission each member's individual whims or prejudices are safely submerged and averaged in the combined judgment of the whole commission, since no member exerts any authority in the municipal government save as one voting member of the commission.

6. The city-manager plan abandons all attempts to choose administrators by popular election. This is desirable.

7. The city-manager plan leaves the lines of responsibility unmis-

takably clear, avoiding the confusion in the Des Moines plan between the responsibility of the individual commissioners and that of the commission as a whole.

8. It provides a basis for better discipline and harmony, inasmuch as the city-manager cannot safely be at odds with the commission, as can the Des Moines commissioners in their capacity as department heads, or the mayor with the council in the mayor-and-council plan.

9. It is better adapted for large cities than the Des Moines plan. Large cities should have more than five members in their commission, to avoid overloading the members with work and responsibility, and to avoid conferring too much legislative power per individual member. Unlike the Des Moines plan, the city-manager plan permits such enlarged commissions, and so opens the way to the broader and more diversified representation which large cities need.

10. In very small cities, by providing the services of one well-paid manager instead of five or three paid commissioners, it makes possible economy in salaries and overhead expenses.

11. It permits ward elections or proportional representation, as the Des Moines plan does not. One or the other of these is likely to prove desirable in very large cities, to preserve a district of such size that it will not be so big that the cost and difficulty of effective canvassing will balk independent candidacies, thereby giving a monopoly of hopeful nominations to permanent political machines.

12. It creates positions (membership in the commission) which should be attractive to first-class citizens, since the service offers opportunities for high usefulness without interruption of their private careers.[1]

The city-manager plan is then a form of government which combines the ideas of the small representative body elected at large on a nonpartisan ballot, possessing all of the larger powers of the cities and subject to certain important checks in the hands of the electorate, with concentration of administrative power into a single individual chosen by the representative body because of expert professional qualifications. Such a plan adopts the valuable features of commission government and remedies the two fundamental defects of that form.

The fundamental feature of the city-manager charter is

[1] Taken from pamphlet issued by the National Municipal League on "The Commission Plan and the Commission-manager Plan of Municipal Government," Majority Report, pp. 17 ff.

the provision with respect to the manager which deals with his selection, with his powers and duties and his control over the administrative forces of the city. To be an effective manager he must be given large powers, and, though checks must be placed upon him, he must not be interfered with in the management of departments and in the details of administration. In order to make the work of the city manager effective it is necessary to introduce two other important features in city government. The first is a scientific budget system along with uniform accounting and accurate and thorough auditing methods. Such provisions will make it possible for the manager to insure good results and at the same time safeguard the public interest where it is most vitally affected—namely, in the treatment of the city's revenues and expenditures. Furthermore, special arrangements should be made for civil service in the appointment of subordinate positions in the city government. If the city charter makes adequate provisions for the city manager to introduce a scientific budget system, provides for the merit system in the appointment of subordinate officials, and creates a commission to select the manager and to advise with him in the passage of ordinances and in the determination of the policies of the city, it is thought possible by this plan to secure a form of administration more effective and with better results than under any plan of administration thus far adopted in American cities.[1]

The commission form of government and the city-manager plan have each led to certain marked improvements in municipal administration. Commission government has resulted in greater concentration of authority and a more direct location of responsibility, with more effective popular control. The city-manager plan has had a tendency to encourage the selection of men of adminis-

[1] By October, 1920, 186 cities were operating under city-manager charters. See *Bulletins for the Constitutional Convention*, Massachusetts, 1917–18, vol. i, no. 13, on "The City-manager Plan of Municipal Government."

trative ability, wherever they may be found, and to place emphasis upon training and experience in making selections. The term of managers has been too short, however, and the number of specially trained men for such work too few to assure a permanent personnel of trained administrators which appears to be essential to the success of the manager plan. Organized efforts have been made to help train men for the responsibilities of this position and, in the main, the selections made for managers have been from among those who have demonstrated their administrative ability in other fields of endeavor. With the commission or council serving as a board of directors, and not the manager and subordinates selected on the merit basis, a better opportunity is afforded to manage public affairs efficiently. It remains for American cities to develop a professional class of administrators whose tenure will be permanent and based solely upon merit. No ready-made form of charter can change ramshackle into efficient administration, and it is quite easy to place too much emphasis on charter making to the neglect of equally important factors in city government. But charter making has tended to bring to the light some of the essential elements of weakness in present methods of administration, and to differentiate the functions to be alloted to an elected commission, those which should be performed by appointive officers, and those on which the electorate itself should render a verdict. Publicity has rendered the problem of improving city administration much clearer, and has, at least, pointed the way to remove some of the serious defects which have served as handicaps.[1]

Some Principles in the Administration of Local Government in the United States.[2]—The chief characteristic of local administration in the United States is that all of the powers of local districts and all of the duties of

[1] *Prepare an analysis of a Commission Government charter and City-manager charter.*

[2] See F. J. Goodnow, *Comparative Administrative Law* (Students' Edition), (G. P. Putnam's Sons, 1903), vol. i, pp. 223 ff.

officers in these districts are determined in detail by statutes. Such control as is exercised over local units is in large part prescribed by the legislature. Formerly, this regulation was provided in special and local acts which dealt separately with each locality. But the evils of such a system of special legislation led to the constitutional requirement that powers and duties of local government bodies shall be dealt with in general acts. It has been necessary, however, to permit the legislature to prescribe by special acts for the regulation of certain matters which cannot be completely and satisfactorily comprehended in general laws. Thus, while the principle of special acts has been condemned, the courts have found it necessary to permit the practice to a limited extent in order to provide for exceptional circumstances which are constantly arising. The general result of this practice has been to interfere with the independence of local units and to render it difficult to distinguish between affairs which are central and those which are local in character.

The second characteristic of local administration in the United States is the great number of authorities which are independent of one another and are not under the control or direction of any central power. According to Professor Goodnow,

> The rule is that, notwithstanding most of the authorities in the local areas attend to a great deal of work which interests the commonwealth as a whole, they shall still be elected by the people of the localities in which they act, and when elected shall act free from almost all central administrative control. Seldom do we find that any administrative authority has the power to direct them how they shall perform their duties or to quash or amend their action or to exercise any disciplinary power over them. . . . The general characteristic of the American system of local administration is that it is from the administrative point of view extremely decentralized. The administrative control, both central and local, is believed to be unnecessary because of the detailed enumeration in the statutes of all the powers of the local corporations, and of the officers in the local areas. Everything is so fully regulated by the legislature that there is little room left for administrative instructions to be sent either by the central authorities of the

commonwealth or any superior local authority. In order to insure that officers will perform the duties imposed upon them by the statutes, resort has been had to the sanctions of the criminal law. To the violation of almost every official duty is attached a criminal penalty which is to be enforced by the ordinary criminal courts. Detailed enumeration of official duties in the statutes and punishment of the violation of official duties by the criminal courts are thought to be sufficient to insure efficient and impartial administration and to obviate the necessity of forming any strong administrative control.[1]

The third characteristic of local administration in the United States is that the services are performed by lay or nonprofessional officers. Frequently officers receive small salaries or per diem allowances. Officers are selected from the ranks of the ordinary vocations of life to serve for a short term, and are then returned to private life.

Though numerous exceptions have been made to these principles, they remain basic in all local administration. The peculiarities of these principles in operation may be better appreciated in comparison with the French system of local administration and the English method of provisional orders. There are marked differences between the method of administering local government in England and in the United States and the method employed in continental European countries.

The French System of Local Administration

In the first place, administration in France is carefuly divided into central affairs, which are largely in charge of central officers with strict control and supervision, and local affairs, which are almost entirely in the hands of local officers. In the second place, continental European countries do not attempt to define the duties of local governmental bodies, but merely formulate general principles of local administration which are to be carried into effect, the details of which are to be filled in by the local officers

[1] F. J. Goodnow, *Comparative Administrative Law* (Students' Edition), (by courtesy of G. P. Putnam's Sons, 1903), vol. i, pp. 228–231.

themselves. The officers of local corporations, such as counties and cities, are not, as in the United States, authorities of enumerated powers, but have the right to exercise all powers which they wish, provided they conform to the general laws applicable. All local bodies, however, are subject to a central administrative control which prevents them from encroaching upon the domain of the central government and from acting contrary to the best interests of the nation as a whole.

In view of the fact that the French system of administration has been accepted as a model for the majority of continental European countries and has been followed to a considerable extent in South and Central American states, it seems desirable to undertake a brief survey of the general plan of the French system.[1]

For the purpose of local administration France is divided into departments known as administrative districts. Each department is a unit for carrying out central affairs, and is also a corporation with its own officers and with many duties of a local nature to perform. At the head of the department is a prefect, who is appointed and removed by the president of the Republic on the recommendation of the Minister of the Interior. The office of prefect is regarded as professional in character and as requiring special training and qualifications. The prefect is in charge of central affairs, in accordance with which it is his duty to see that the laws and decrees of the central government are effectively carried into operation. He appoints and dismisses a large number of officers, such as postmasters, police officers, prison wardens, collectors of taxes, highway overseers, and teachers in the schools. "He has also a wide power of direction and control over the acts of all these officers and may remove them from office. He has a large police ordinance power where the matters to be regulated

[1] For a more complete account of the French system of local administration, see F. J. Goodnow, *Comparative Administrative Law*, vol. i, book iii, chap. vi, from which this account is condensed. *Cf.* also E. M. Sait, *Government and Politics of France*, chap. viii (World Book Company, 1920).

are of such a character as to need uniform regulation."[1] The prefect likewise exercises an extensive control over the smaller units, the communes. As a local officer for the department, he appoints officers in the departmental service, has charge of the financial administration of the department, and directs the management and control of all departmental public works. He prepares the departmental budget and is the executive officer of the departmental council which determines the general policies of the management of the department.

By the side of the prefect is the council of the prefecture, composed of members appointed and dismissed by the President of the Republic. They are salaried and professional officers and may not follow any other occupation. The council is an administrative body, and as such advises the prefect in all of his duties and responsibilities. The prefect, however, is not obliged to act in accordance with the advice so obtained.

In addition to consulting with the professional council which is associated with him, the prefect is further expected to advise and consult with a body known as the departmental commission. This commission is composed of from four to seven members who are elected by the general council of the department. The members of commissions receive no salary and may follow other occupations. The main duty of the commission is to present to the general council the budget of the prefect, with suggestions and recommendations, and to make an inventory of the property of the department. Its consent is necessary to the making of all important contracts. In a measure, the departmental commission acts as an executive committee of the council, which may delegate other powers and duties to this body.

Composed of members elected on the basis of universal suffrage, the general council is the legislative body for the

[1] F. J. Goodnow, *Comparative Administrative Law*, vol. i, book iii, chap. vi, p. 273.

department. Members are elected from cantons for a term of six years, one-half of the members retiring every third year. Ordinarily the council meets twice a year, but it may be convened on other occasions by order of the President. General control over the local affairs of the department is exercised by the council, subject to central control and supervision. All of the department property, finances, taxes, highways, with the exception of state roads, departmental public works, and public salaries are in charge of the council, which also exercises an extensive supervision over the communes. With respect to central affairs, the council is closely supervised, and its acts may be vetoed on the recommendation of the prefect. In financial matters and in the preparation of the budget, it is necessary that the acts of the council have the approval of the central administrative authorities.

While in central affairs the acts of the council are thus subject to a review and control, it is true that in purely local affairs the management of the department is almost entirely in the hands of the general council. For the purpose of local government, each department is divided into *arrondissements*, or districts, at the head of which is placed an under-prefect and a district council. The under-prefect is appointed and dismissed by the President and, like the prefect, is a professional officer. The primary duty of the under-prefect is the carrying out of the orders of the prefect for the district over which he has control. In the apportionment of taxes for the district the council advises with the under-prefect.

The most important unit for local government in France is the commune. Communes are historic units, all of France being subdivided into rural or urban communes. The government of the commune is in charge of a mayor and several deputies, who are elected by the municipal council from among the members of that body. These officers serve during the term of the council, but may be suspended by the prefect of the department for one month,

by the Minister of the Interior for three months, and may be removed by the President of the Republic. For the carrying out of central duties, the prefect exercises control over the acts of the mayor. The mayor and his deputies are unsalaried and are not professional officers. Like the prefect, the mayor is a central officer and, as such, is expected to enforce the laws and decrees made by the central government. For this purpose he has control of police, election and health officials, and is granted a large ordinance power. He has the right, also, to issue ordinances to maintain good order, public peace, and health. As a local officer, he has the appointment of the communal officers, and it is his duty to take charge of the details of local administration. He draws up the budget of the commune, orders the payment of all expenditures, has charge of the revenue and property, executes contracts, and supervises all acts. "But in all these matters, it must be remembered that the mayor is simply to execute the decisions of the municipal council, which has the final determination of all matters of communal interest."[1]

The legislative body for the commune is the municipal council, elected by universal manhood suffrage for a term of four years. Ordinarily the council holds four sessions a year, and the duties of the council relate to the general supervision and control of the local affairs of the commune. Since local government is left largely to the local officers, a great many duties and responsibilities are placed upon the council, with the arrangement, however, that the budget and important financial undertakings must receive the approval of the central administration before being carried into effect.

The general characteristics of the French system of local administration, may, then, be summarized as follows:

1. Larger powers are granted to local governments in France than in the United States or in England. "A French city may adopt such

[1] F. J. Goodnow, *Comparative Administrative Law*, vol. i, book iii, chap. vi, p. 289.

institutions of local concern as it may see fit without being obliged, as is so often the case in the United States, to appeal to the legislature for power."

2. Along with the grant of large powers to local corporations is the provision for central administrative control over their actions. Central control is exercised for three purposes: 1. To force local officers to act in such a way that matters of general concern will not suffer by negligence or carelessness; 2. To prevent local corporations from encroaching upon the sphere of central administration; 3. To prevent the localities from extravagance and unwise financial administration.

3. The officers who attend to the detailed work of the administration are for the most part professional in character. They are salaried officials, devote their whole time to the work, and are supervised and directed in large part by instructions issued by central administrative authorities.[1]

It is evident, then, that the French system of local administration is fundamentally different from that of either England or the United States, where the duties of local authorities are minutely defined in statutes. But the obvious defects of this arrangement have been remedied in England by the establishment of a system of central control and by an ingenious device, known as "provisional orders" designed to relieve the legislature of the duty of determining the details of administrative routine.

English Method of Provisional Orders[2]

In order to provide for central control over local authorities and to relieve the legislature of providing for the details of the duties and responsibilities of local officers, the device known as "provisional orders" has developed in England. It was formerly the practice in England, as in the United States, to grant powers to local units, such as counties, boroughs, and parishes, by general law or by special statute. As the administrative needs of local governments increased, the requests for special legislation grew so numerous that Parliament was forced to seek relief.

[1] F. J. Goodnow, *op. cit.*, pp. 292–294.

[2] See *Bulletins for Constitutional Convention*, Massachusetts, 1917–18, vol. ii, no. 30, p. 367, from which this account is condensed.

To reduce the great number of private and local bills, Parliament vested general powers over local authorities in boards or departments, such as the Local Government Board and Board of Trade, and permitted these boards to grant further powers by provisional orders within well-defined limits and restrictions. A provisional order may be defined as "an ordinance made by a department of the government which acquires the force of law either automatically after a fixed period . . . or by the express confirmation of Parliament itself."[1]

Legislation passed by Parliament with reference to local affairs is usually drawn in broad terms and in many cases made permissive. This is particularly true of laws which confer powers upon municipalities. In such laws, however, it has become more and more usual to insert a clause providing that any municipality which desires to exercise such permissive power must first secure by provisional order the approval of the Local Government Board, or the Board of Trade, or the Home Office. If, for example, an English municipality wishes to borrow money or to engage in any form of public-service enterprise, it ordinarily applies for a provisional order, not for a special act, as in this country. When an application for a provisional order is made on behalf of any local authority, an inquiry or hearing is held by an inspector of the central board. This is arranged by sending the officer to the municipality concerned; upon his report and after an examination of the information obtained by him, the order is then issued or refused.

In some cases the orders issued by the various administrative authorities are final; but in other cases the statutes require that provisional orders shall be laid before the Houses of Parliament, and that they shall not go into effect if either of them passes a resolution of disapproval within a certain prescribed period. It is difficult to draw

[1] *Bulletins for Constitutional Convention*, Massachusetts, 1917–18, vol. ii, no. 30, p. 367.

any definite line between those matters in which the action of the administrative authorities is final and those that must be laid before Parliament, because the procedure in any instance depends upon the subject matter of the provisional order, upon the statute under which it is granted, and upon the question as to whether or not the order is opposed. Some of the provisional orders which are required to be laid before Parliament, whether opposed or not, are those granted by the Board of Trade to railways for raising capital, in regard to deciding upon working agreements, and other matters. Among the orders that must be submitted to Parliament, if opposed, are those issued by the Local Government Board granting charters to boroughs, changing boundaries of parishes, providing dwellings for the working classes, and so on.

As a general practice, however, it may be said that provisional orders conferring important powers must be submitted to Parliament for formal ratification. Every year such of the provisional orders as are thus submitted are grouped together into a series of consolidated measures, known as Provisional Orders Confirmation Acts, and passed through the usual stages like other private bills. They may be amended or rejected at the discretion of Parliament; but as a matter of fact it is rare that any provisional order is stricken from one of these bills in Parliament. During the last fifty years, for example, nearly four thousand provisional orders have been issued by the Local Government Board, and of these only about thirty-five, or less than 1 per cent, have been rejected by Parliament.

Recent Changes in the American System of Administration

Chief among the problems of administrative organization and practice in the United States are the tendencies in the direction of greater centralization in administration and the introduction and extension of the practice of supplementing

statutes by administrative orders on a plan similar to the French and English systems.

Administrative Centralization.—The executive departments of the Federal government have been organized on a plan of specific and complete consolidation and concentration of authority. A similar principle is being applied in the states in the establishment of boards, bureaus, and commissions with extensive supervision over local government units. This concentration of authority has been extended primarily to the control of education, health, roads, and tax administration, but it underlies the general movement for the establishment of a multitude of administrative agencies. The general function of these agencies is to cooperate with local units and to aid in the development of better standards of administration. In a few instances, such as health and tax administration, authority is being granted to control local administration either by the appointment of local officials through central officers or by the authority to send central agents to the locality to perform the functions which are either neglected or inadequately performed. In cities the centralization movement has spread rapidly in the adoption of commission government or commission-manager charters with administrative authority concentrated in a small board or in a single official. Concentration has entered the field of county government, in a few instances where the former disintegrated system is superseded by the control of a small commission or of a county manager. Everywhere the watchword is greater concentration of authority, and correlated therewith is the idea of establishing a more direct responsibility to the electorate through the initiative, referendum, and recall. Administrative concentration leads to important modifications of the traditional theory of separation of powers and the legislative control over the details of administration—two of the primary principles in the formation of the American system of government. Just as the theory of the separation of powers has been abandoned to secure more effective

administration in county, city, and state governments, so the practice of the determination of administrative organization in detail by legislatures is being limited or abandoned entirely.

Administrative Orders to Supplement Statutes.—Though executive officers in the United States are limited in their actions to powers and duties defined in the laws, it is quite impossible for the legislature to regulate all of the details of administration. This fact is recognized in the creation of commissions with certain prescribed rule-making powers and in the granting of a limited ordinance power to the President and state executive officers in charge of such matters as immigration, customs, and taxation.

Few people are aware of the great extent to which public administration in the United States national government is controlled by means of administrative regulations or orders, in the nature of subordinate legislation. . . . It is, of course, true that administrative regulations in the United States are, on the whole, of comparatively less importance than Orders in Council and departmental regulations in Great Britain; and relatively still less important than have been the administrative ordinances of the German Bundesrath or the decrees issued in the name of the President of the Republic of France, and similar regulations in other European countries. But the volume and importance of such administrative regulations in the national administration of the United States are, nevertheless, deserving of much more attention than they have hitherto received. . . . .

There are, indeed, besides presidential proclamations and executive orders, many elaborate systems of executive regulations governing the transaction of business in each of the executive departments and in the various services both within and without these departments. These include organized codes of regulations for the army, the navy, the postal service, the consular service, the customs service, the internal revenue service, the coast guard, the patent office, the pension office, the land office, the Indian service, the steamboat inspection service, the immigration and the naturalization bureaus, and the civil-service rules. In addition to long-established types of regulations, there have been many new series of regulations issued in recent years both before the war and more recently by the new war agencies, such as the Food and Fuel Administrations, the War Industries Board, and the War Trade Board.[1]

[1] John A. Fairlie, "Administrative Legislation," *Michigan Law Review* (January, 1920), vol. xviii, pp. 181–182.

Among the most important departments issuing rules and regulations having the force of law are the Army and Navy departments, the Department of Agriculture, the Treasury Department, and the Post Office, Commerce and Labor Departments. In addition, ordinance-making powers are exercised by the Interstate Commerce Commission, the Federal Trade Commission, the Federal Reserve Board, and the Farm Loan Board.[1] That these regulations have in many instances the full force and effect of laws is the conclusion of the Supreme Court in numerous cases involving such regulations.[2]

A similar tendency is apparent in the powers granted to commissions in state governments. For example, civil service commissions, public utility commissions, state boards of health, education, etc., have been authorized to issue rules having the full force and effect of laws. When, as in Illinois and New Jersey, this authority is extended to the determination of the salaries and duties of subordinate officers, a practice is inaugurated which greatly restricts legislative power over administrative details. How far this practice will be extended and what effect it will have on administrative organization and personnel, it is difficult to surmise. What form administrative organization will take to secure efficiency and economy in government remains in large part to be determined.

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[1] John A. Fairlie, "Administrative Legislation," *Michigan Law Review* (January, 1920), vol. xviii, pp. 186–187.

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CHAPTER VI

PROBLEMS IN THE ORGANIZATION OF COURTS AND IN THE ADMINISTRATION OF JUSTICE

"I do know that the United States, in its judicial procedure, is many decades behind every civilized government in the world; and I say that it is an immediate and an imperative call upon us to rectify that, because the speediness of justice, the inexpensiveness of justice, the ready access to justice, is the greatest part of justice itself."

—Woodrow Wilson.

"Justice in the minor courts—the only courts that millions of our people know—administered without favoritism by men conspicuous for wisdom and probity, is the best assurance of respect for our institutions."—Charles E. Hughes.

General Characteristics of Judicial Organization in the United States

According to President Taft, "the greatest question before the American people is the improvement of the administration of justice, civil and criminal, both in the matter of its prompt dispatch and the cheapening of its use." The problem of securing an efficient judicial system has been especially difficult in America, where the theory has prevailed that all departments of government must be based on popular approval and sanction. In many respects the judiciary is the most important branch of the American government. Because of the extraordinary authority accorded to the courts to review and to pass upon the validity of legislation, and because of the general phrases in constitutions by which legislative acts are measured on the basis of reasonableness and justice, the judiciary of the American government exercises a greater supervision and control over other departments than does the judiciary in any other government. Moreover, the failure to provide

administrative supervision over subordinate officers has left a large responsibility to the courts, whose duty it becomes to scan the authority of these officers, to decide whether their acts are within the law, and, at times, to determine whether public authority has been exercised arbitrarily. In each of these rôles the American judiciary has performed distinct services in addition to its normal functions, which are the settling of controversies that arise and the protecting of the citizen in his rights.

Although in England and the United States the courts exercise a determining influence in the process of law-making, it is probable that in no other instance have legislatures turned out such an extensive and significant body of statute law as is now represented by the product of American legislatures.

Our "experiment stations," as Viscount Bryce termed them, have been turning out thousands of volumes of statute law which constitute a veritable library, including session laws, general statutes, and codes with numerous compilations and annotations for each state and for the Federal government. This voluminous product of lawmakers has called for a mass of interpretative judicial decisions, which, for any one state, has become so extensive as to lead to bewildering confusion, to which lawyers often testify, but for which no satisfactory remedy seems available. The Library of Congress reported that in a five-year period 610 volumes of state reports were issued, containing 64,318 decisions, and for the same period there appeared twenty volumes of Federal reports, containing 1,061 decisions. The number of statutes added to American law during this same period is estimated at 62,014. "With 13,000 decisions of courts of last resort being made each year, and 12,000 laws annually enacted by the legislatures, no man could determine his rights without employing attorneys."[1]

[1] R. H. Smith, "Justice and the Poor," *Bulletin of the Carnegie Foundation for the Advancement of Teaching*, no. xiii (1919), p. 7.

Common law, statutes, and judicial decisions combine to make law in the United States insurmountably involved and complex.

Judicial organization in the United States was originally established in accordance with the English model, which at that time involved a multiplicity of courts. Under the pioneer conditions which then prevailed in the United States the main object was to keep peace, and to accomplish this end it soon became necessary to develop rules.[1] At the beginning of the nineteenth century,

> American law was undeveloped and uncertain. Administration of justice by lay judges, by executive officers, and by legislatures was crude, unequal, and often partisan, if not corrupt. The prime requirement was rule and system, whereby to guarantee uniformity, equality, and certainty.[2]

Thus, the chief problem of the formative period of American law was to discover and to lay down rules which would meet the requirements of American life and which would effectively restrict the powers of the magistrate by leaving as little to his personal judgment and discretion as possible. The chief design was to leave as much freedom as possible to the initiative of the individual and to confine governmental action to the minimum required to keep the peace. This purpose determined the course of our legal development and the organization of courts until the last quarter of the nineteenth century.[3]

The general type of judicial organization in American states provides for four courts or sets of courts. First, there is a supreme tribunal of appellate jurisdiction, composed of a fixed number of judges who sit in this tribunal and who review the work of the superior courts of first instance. The judges of the supreme tribunal are not permitted to serve in any other court. Sometimes an intermediate court is established between the superior court and the

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[1] See Roscoe Pound, "Organization of Courts," *American Judicature Society Bulletin*, no. vi. 31 West Lake Street, Chicago.

[2] *Ibid.*, p. 13.

[3] *Ibid.*, pp. 12–13.

supreme court. Second, there is a group of superior courts, established in fixed districts with a judge or number of judges assigned to each. As a rule these judges, too, cannot sit elsewhere. Third, there are in each county, courts with probate and general jurisdiction in civil and criminal matters. Fourth, there is a set of magistrate courts with one for each locality. These courts are frequently presided over by laymen and are usually supported by fees.

Though the plan of judicial organization as above described served well the needs of the country during the first decades of the establishment of state governments, certain defects have become apparent as the courts have had to deal with the more complex and intricate conditions of modern society.

Defects of American Judicial Organization

Regulation of Procedure by Legislative Acts.—A fundamental difficulty in court organization in the United States is that constitutions and legislative acts regulate courts and judicial procedure in too great detail. "The legislative attempt to fix the machinery of justice in all its details made of procedure a maze which precluded litigation unless the suitor could engage counsel to guide his case through all the technicalities."[1] In England and in European countries it is customary for the legislature to organize courts and to lay down certain general principles, leaving to the courts the completion of the details of organization and administration, and the determination of rules and regulations in matters of procedure. On the contrary, legislatures in the United States attempt to regulate in detail not only the organization of courts, but also matters of procedure. The essential element of flexibility and the adjustment to meet special conditions which other countries provide are

[1] R. H. Smith, "Justice and the Poor," *Bulletin of the Carnegie Foundation for the Advancement of Teaching*, no. xiii (1919), p. 7.

thus lacking in the United States. Experience has demonstrated that it is impossible for a court of justice to function effectively unless it can have considerable freedom in the preparation of rules and regulations applicable to its work. Elihu Root, speaking before the American Bar Association in 1916, called attention to this defect:

> A large part of the detailed and specific legislative provisions regulating practice is really designed to enable law business to be carried on without calling for exercise of discretion on the part of the court, and the evil results of the absurdly technical procedure which obtains in many states really come from intolerance of judicial control over the business of courts. A more complete and unrestricted control by the court over its own procedure would tend greatly to make the administration of justice more prompt, inexpensive, and effective.[1]

Creation of Separate Courts.[2]—In the establishment of courts in the United States separate courts are often created without any definite system of unification or central control. A hierarchy of courts has been constituted, including, as a rule, justices of the peace, county courts, district courts, and a supreme court, with sometimes additional tribunals to relieve an overburdened docket. Errors of inferior courts are of course corrected on appeal to a higher tribunal, but in the general administration of judicial affairs the supreme court does not control the inferior courts and the inferior courts cannot control the justices. Each court works under general laws embodied in constitutions or legislative acts, without any direct control by a higher authority. The absence of a general plan of centralization in administrative matters has often resulted in the organization of too many separate courts without an adequate arrangement for an adjustment of functions and without the necessary provisions for unity of action. Thus it often happens that some justices with little to do cannot be transferred to adjacent districts where an overcrowded

[1] *Reports of American Bar Association*, vol. xli (1916), p. 364.

[2] See "Justice Through Simplified Procedure," *Annals of the American Academy of Political and Social Science*, vol. xxxiii (September, 1917), pp. 23 ff., for proposed sections of a state constitution embodying certain reforms.

docket compels other justices to work overtime and yet leave controversies undetermined. Furthermore, it is impossible to differentiate in functions so as to give a judge who is a specialist in some particular branch of the law an opportunity to use his ability where it would count most. Judges must often cover all branches of the law and decide every variety of controversy, a condition which encourages superficiality and entails a great waste of effort.

The Selection and Retiring of Judges.—The ordinary method of selecting judges in the states is by the ballot and by a system of nomination which places the original choice in the hands of party organizations. Though the character and ability of judges selected under this system have been, on the whole, remarkably satisfactory, it is nevertheless true that the elective system does not secure the best men available for the position of judge. It is generally considered that the best state courts in the United States are those in which the judiciary has been appointed, and the appointive feature of the Federal judiciary is almost universally commended. If a well-guarded appointive system can be provided in which experience, training, and merit count, it is conceded that this is the best method of securing judges.

Under the American system, it is exceedingly difficult to retire judges whose unfitness has become even notorious. The method of impeachment has been found unsatisfactory because it is too slow and cumbersome. The proposed remedy for this difficulty is to appoint judges for a long term and to put into operation a system of recall with a sufficiently high percentage that a judge could be recalled only in case of flagrant abuse of power, or for other reasons which would take from him the confidence and support of a large majority of the electors.[1]

Our law has frequently been interpreted and applied in

[1] See *American Judicature Society Bulletin*, no. x, on "The Selection, Tenure, and Retirement of Judges," by James Parker Hall, and no. vi, on "Methods of Selecting and Retiring Judges," by Albert M. Kales.

the United States by what has been termed a lay judiciary—*i.e.*, men called to the bench from politics or other walks of life. It was formerly the custom to elevate laymen to the position of judge, and the practice still continues in our inferior courts, so that not infrequently a man whose training and experience have been almost wholly in other fields is called to one of our higher courts. Two of the greatest chief justices of the Supreme Court were taken directly from political positions. Owing to the unsatisfactory method of selecting judges and certain marked defects in legal training, a noted legal scholar, after reading thousands of judicial decisions, sums up his impressions of the composite trait of a typical court of the United States under the following headings:

1. Lack of acquaintance with legal science.
2. Lack of acquaintance with legal history.
3. The philosophy and jurisprudence of the law are unknown.[1]

When frontier and primitive conditions prevailed, a physician, baker, merchant, or perchance a lawyer with little knowledge of legal history, of legal science, or of the philosophy of the law might secure enough of a working basis of the technicalities of the law to decide ordinary controversies on a basis of relative fairness and justice. In the early history of the United States, judges and other judicial officers who knew little law determined controversies by means of moral principles and by the common standards of justice which prevailed in the community concerned. But with the growing complexity of modern life and of the law itself, adequate training in legal history and in legal science is indispensable, and it is also imperative that judges have preliminary experience in the practice and technic of deciding cases. Law has become such a science and profession that no longer can the protection of fundamental rights and privileges be turned over to those who, after lingering a few years around a

[1] J. H. Wigmore, "The Qualities of Current Judicial Decisions," *Illinois Law Review*, vol. ix, p. 529.

lawyer's office, pass a perfunctory examination in legal lore and then secure their education at the expense of unfortunate clients. Fortunately, the entrance to the legal profession is becoming more difficult in all states, and the preparation for the bench should require, as it now does in some advanced nations, specialized preparation and experience.

Much time and constructive thought have been given to the reform of executive and legislative machinery in cities, counties, and states. And substantial progress has been made in the adoption of the short ballot, the commission form of government for cities, civil-service reform, a budget system, and the reorganization of the administrative departments of state government. It is only within recent years that similar attention has been given to the reform of the machinery for the administration of justice. To realize that reform and reconstruction are necessary in judicial procedure we need only turn to the testimony of legal specialists.

Criticisms of Present Methods of Administering Justice

In 1906 Roscoe Pound delivered before the American Bar Association an epoch-making address on "The Causes of Popular Dissatisfaction with the Administration of Justice." At this time many lawyers were unwilling to admit that there were any serious defects in the administration of justice. But evidence has been accumulating to the effect that

> . . . the administration of American justice is not impartial, the rich and the poor do not stand on an equality before the law, the traditional method of providing justice has operated to close the door of the courts to the poor and has caused a gross denial of justice in all parts of the country to millions of persons.[1]

[1] R. H. Smith, "Justice and the Poor," *Bulletin of the Carnegie Foundation for the Advancement of Teaching*, no. xiiii (1919), pp. 7–8.

In the words of Dean Pound,

> Our system of courts is archaic and our procedure behind the times. Uncertainty, delay, and expense, and, above all, the injustice of deciding cases upon points of practice, which are the mere etiquette of justice—direct results of the organization of our courts, and the backwardness of our procedure—have created a deep-seated desire to keep out of court, right or wrong, on the part of every sensible business man in the community.

According to the Secretary of the American Judicature Society (an organization interested in judicial reform), "it is no secret that promptness and certainty of conviction constitute the most effective deterrent to crime. But our courts yield neither promptness nor certainty."[1] Moreover,

> We have made it altogether too easy to get into court and quite difficult to get out of court. In every large city, there is a host of lawyers and would-be lawyers hungry and ready for business; and while the high-minded attorney strives to keep his client out of court and seeks to serve him with all honorable means at his command, there is a large number of those who encourage litigation and derive their fattest fees from the very entanglements into which they thrust their clients. And when you add to these lawyers the ambulance chaser, the runner, the officer, the collector, and the constable, you have a veritable army lying in wait for clients and lawsuits.[2]

Despite noteworthy reforms already accomplished in one of our greatest states, a special committee reported in 1917 that "there still exist anomalies, duplications of effort, unnecessary cogs in the judicial machine creating friction, arresting the prompt and expeditious functioning of the machine," which condition leads to the indictment that the administration of justice does not progress so as to conform to modern conditions.

These strictures on the system of courts and the adminis-

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[1] Herbert Harley, *Journal of American Judicature Society*, vol. iii, no. i (June, 1919), p. 7.

[2] Judge Manuel Levine, "The Conciliation Court of Cleveland," *American Judicature Society Bulletin*, no. viii (April, 1915), p. 5; for illustrations of denial of justice because of defects in the administration of justice, consult Smith, "Justice and the Poor," chap. ii.

tration of justice with many others from the reports of bar associations and law journals would be very discouraging and would seriously undermine the security and integrity of our judicial system, were it not that the remedy is apparent and in many instances easily applied, and were it not that a beginning has been made toward correcting some of the most serious defects. Before undertaking a consideration of the steps in judicial reform, it will be necessary to review briefly some of the obvious defects which have helped to render the administration of justice ineffective and unsatisfactory.

Defects in Methods of Judicial Administration.—Certain defects in the methods of administering justice have become so pronounced as to call forth serious criticisms. It is possible to present only a mere outline of the defects which have occasioned the greatest objections. Among these defects is the difficulty involved in the mechanical operation of the law. In this regard, frequent application of technical rules results in a denial of justice. The tendency of law is to become fixed and crystallized into settled rules which apply unreasonably or unfairly in concrete cases. In European countries it is customary to give the judge discretion to decide contrary to the rule when it is necessary to do so in order to give justice. In France, judges are forbidden to lay down general rules of conduct or to decide cases by holding that they are governed by previous decisions. This principle tends to take away the emphasis upon precedent and technical rules which at times bind the judges too strictly in the United States.

Another difficulty is involved in the practice which encourages appeal of cases on slight technicalities. Appeals mean delay and additional expense. Delay frequently results in the formulation of a device by which the guilty may escape. Liberality of appeal is favorable to the rich man and to corporations. The expenses of appeal to the supreme court of a state and of the United States are very great; accordingly, only the wealthy, the corporate inter-

ests, or large organizations can afford to carry cases to these higher courts. In the judgment of President Taft, the lack of appeal would be the greatest blessing for the poor litigant, provided, of course, that there would be a possibility of a new trial in case of error.

Too much contentious delay occasioned by the employment of lawyers in minor cases is another objection to the present administration of justice. Many of the small causes which should be settled out of court or by some system of arbitration are continued by the employment of counsel, and a considerable amount of time and expense is unnecessarily wasted. Other countries have provided simple and expeditious methods of disposing of minor cases. These methods will be briefly considered in connection with proposed remedies for the existing defects in the administration of justice.

The administration of justice is hampered also by the lack of adequate records and scientific methods. A mere beginning has been made in the securing of criminal statistics. The settlement of controversies has been in the nature of a slot-machine process, decisions being rendered often in a mechanical fashion without full recognition that criminals are individuals who may need medical treatment or perhaps may be aided by the investigations of psychology, sociology, and economics.

Probably the worst feature of the administration of justice is the cruel and brutal treatment which has too frequently been accorded to prisoners in the county jails, the prisons, and the penitentiaries. Recent investigations have brought to the attention of the public the fact that revolting conditions have been allowed to prevail under the old method of herding together prisoners of all classes and grades in an unsanitary, dingy place that is utterly unfit for human habitation.

The Failure of the Jury System.—A conspicuous failure of the present system of the administration of justice is that in connection with the jury system. The character

of the jurors usually selected is such as to discredit the method for the determination of many cases now requiring a jury. As often operated in the courts, the jury system puts a ban upon intelligence and honesty and a premium upon ignorance, stupidity, and perjury. The difficulty of selecting a jury in important cases has tended to delay the trial and to discredit the entire process of justice. Furthermore, the jury is frequently called upon to decide questions which are entirely beyond the range of possibility of determination by any except experts trained in the law and in the principles of evidence. A further difficulty lies in the fact that the judge in most states is permitted merely to charge the jury as to the law and is not allowed to give his advice with regard to the facts and the evidence. This consideration renders the judge, who should be the most competent to advise and in the best position to give direction, utterly unable to render an opinion which might be of service to the jury in its coming to a correct and equitable conclusion. One student of judicial reform is of this conviction:

"No more persistent barrier to the achievement of a just result could be conceived by a malignant enemy of mankind than the civil jury system as administered in practice. We hamper it as a popular tribunal by limiting the evidence which it may consider, and by instructing it unintelligently concerning the law which it is to apply. Then we let its uneducated prejudices produce the results and point to them with superstitious pride, while we erect alongside of it another system, that of equity in which the worshiped jury plays no calculable part. Yet with a straight face, and with a legal mind apparently all unconscious of inconsistencies, we praise both systems as having equal claim to our admiration.[1]

Charges as to the Denial of Equality in the Administration of Justice.—Freedom and equality of justice are designated as the "twin fundamental conceptions of American jurisprudence. Together they form the basic principle on which

[1] C. A. Boston, *Annals of the American Academy of Political and Social Science*, vol. xxxiii (September, 1917), pp. 114–115.

our entire plan for the administration of justice is built."[1] These principles, embodied in the declaration of rights of the Massachusetts constitution of 1780, have been re-enacted in practically every constitution since adopted, and they represent an ideal which is regarded as the cornerstone of the American government. They involve the protection of the individual with respect to life, liberty, and property, and the enjoyment of those things upon which human life and happiness depend, in so far as such enjoyment does not infringe upon the rights of others.

Freedom and equality of justice depend upon two things; namely, an impartial substantive law and a just administration of the law.[2] With regard to these it is generally

[1] R. H. Smith, "Justice and the Poor," chap. i.

The appearance of the report of the Carnegie Foundation prepared by Mr. Smith on "Justice and the Poor" has led to considerable public discussion on methods of administering justice. Some, like Ex-Justice Hughes, have thought it necessary to come to the defense of the courts. In his report for 1919, as president of the New York Legal Aid Society, Mr. Hughes said:

"There has also been much discussion in the public press of the general subject of justice and the poor. It would be most unfortunate if in emphasizing the need of legal aid and of remedial measures to secure the better administration of justice, any doubt should be cast upon the impartiality of our courts. Any charge that on account of the lack of impartiality American courts do not give equal justice to the poor would be absolutely baseless and in reckless disregard of the most obvious and gratifying facts. So far as impartiality is concerned, it is our just pride that in this country the poor do not suffer from any discrimination against them, and this fact should constantly be emphasized in any discussion of procedural reform.

"Obstacles to an ideal administration of the law, so far as the poor are concerned, are found not in a lack of impartiality on the part of our judges, but in the delay and expense connected with litigation. Fortunately, in this community great progress has recently been made in removing these obstacles to justice. Procedure has been simplified, and expense so far as court costs are concerned has been so greatly reduced that it would hardly be called any longer an obstacle. . . . No just appraisement of conditions can be made with respect to the administration of justice in the case of the poor in the City of New York without recognition of the fact that remedial measures in getting rid of delay, reducing expense and cutting red tape have brought us to a condition where, so far as proceedings up to the time of judgment are concerned, there is little to be desired."

On the other hand, the attorney of the society, Leonard McGee, Esq., regards Mr. Smith's report as a substantially accurate "résumé of conditions existing throughout the United States," but he believes that New York has gone farther than any other jurisdiction in its endeavor to secure justice for the poor whose rights have been infringed.

Cf. Forty-fourth Annual Report of president, treasurer, and attorney of the Legal Aid Society, New York, for 1919, pp. 9–10 and 28 ff.

[2] R. H. Smith, *op cit.*, p. 13.

conceded that the body of the substantive law, with few exceptions, is free from partiality and class bias, and yet, due to defective methods of administration, obstacles have been placed in the path of those who most need protection, so that litigation becomes impossible, rights are lost, and wrongs go unredressed.[1]

The three defects which have resulted in a denial of justice to the poor are, according to Mr. Smith: (1) delay; (2) court costs and fees; (3) expense of counsel. The evil of delay is, in fact, a serious defect. It results in the defeat of justice by making the time required to bring a case to final judgment so long that parties frequently do not go to court at all, and by forcing unfair settlements and compromises.[2] Fortunately, the difficulty of delay can be in part remedied, and the way to reform is now clear. That the existing system closes the courts to the poor is apparent. "A plaintiff must not only pay the cost for summons, service, entry, trial, judgment, and the like, but in addition he must, on motion, furnish a bond to guarantee that the defendant, if successful, shall not be out of pocket."[3] Though in theory a form is supposed to exist whereby one unable to pay can bring suit, yet in practice such a right is often denied. Court costs, it has been shown, can be greatly reduced. A part of the expense can be borne by the state, and by a special form of proceeding the poor may be accorded a hearing in court. Though the lawyer is indispensable in the conduct of proceedings, the fees which he charges for his services render it impossible for millions to be benefited by his advice and help. It is estimated that "there are in the United States over 35,000,000 men, women, and children whose financial condition renders them unable to pay any appreciable sum for attorney's fees."[4] It is absolutely essential that means be provided whereby the millions who cannot afford to employ counsel may yet be assisted in the settlement of their rights and

[1] R. H. Smith, "Justice and the Poor," chap. i, p. 15.
[2] *Ibid.*, p. 17. [3] *Ibid.*, pp. 28–29. [4] *Ibid.*, p. 33.

legal obligations. Methods by which the administration of the law is rendered more fair and equitable to the average person deserve more careful consideration than they are usually accorded. In the words of Mr. Smith:

> The majority of our judges and lawyers view this situation with indifference. They fail to see behind this denial of justice the suffering and tragedy which it causes, the havoc it plays in individual lives, and its influence in retarding our Americanization program. "The judicial department," said Chief-Justice Marshall, "comes home in its effects to every man's fireside. It passes on his property, his reputation, his life, his all." Because law is all-embracing, the denial of its protection means the destruction of homes through illegal foreclosures, the loss through trick or chicanery of a lifetime's savings, the taking away of children from their parents by fraudulent guardianship proceedings. Hundreds of thousands of men, many of them immigrants, have been unable to collect their wages honestly earned.[1]

No doubt the seriousness of these defects has been greatly increased by the growing complexity of modern economic life and by the rapid influx of immigrants. The failure of the bench and bar, however, to recognize the facts and to bestir themselves to bring about judicial reform has tended to delay the adoption of well-known methods to improve the administration of justice. Fortunately, the attitude of the bar is changing and many lawyers are foremost advocates of reform programs.

Proposed Remedies and Efforts in the Direction of Judicial Reform

The remedies which have been proposed and which have been in part adopted to remedy the difficulties and conditions above described may be briefly considered.

The Organization of Courts. Greater Centralization and Unification.—Various bar associations and other organizations of lawyers, judges, and publicists are recommending a unified system of courts in which the supreme court of a state would be under the direction of a presiding

[1] "Justice and the Poor," p. 9.

judge or judicial superintendent, who, with the associates appointed by him, would be able to appoint, direct, and control the county courts and such inferior tribunals as seem necessary for the administration of justice. In the proposal for centralization it is also recommended that district attorneys and other officers who work with the courts be appointed by them and work under their direction. The chief principles involved in a centralization program were defined by a committee of the American Bar Association and were presented to that organization in 1909.[1]

Principle I. The whole judicial power of each state, at least for civil causes, should be vested in one great court, of which all tribunals should be branches, departments, and divisions. The business as well as the judicial administration of this court should be thoroughly organized so as to prevent not merely waste of judicial power, but all needless clerical work, duplication of papers and records, and the like, thus obviating expense to litigants and cost to the public.

The object of this principle was to unify the conduct of judicial business and to place the supervision of the business of the court under one official.

Principle II. Whenever in the future, practice acts or codes of procedure are drawn up or revised, the statutes should deal only with the general features of procedure, and prescribe the general lines to be followed, leaving details to be fixed by rules of court which the courts may change from time to time as actual experience of their application and operation dictates.

The application of this principle in England has, according to President Taft, "worked with great benefit to the litigant, has secured much expedition in the settlement of controversies, and has practically eliminated the discussion of points of practice and pleading in the appellate courts."

Principle III. Wherever the error complained of is a defect of proof of some matter capable of proof by record or other incontrovertible evidence, defective certification or failure to lay the proper foundation

[1] See "Report of the Special Committee to Suggest Remedies and Formulate Proposed Laws to Prevent Delay and Unnecessary Cost in Litigation," *Reports of American Bar Association*, vol. xxxiv (1909), pp. 578 ff.

for evidence which can, in fact, without involving substantial controversy, be shown to be competent, the court of review should be given power to take additional evidence for the purpose of sustaining a judgment.

Lack of power in appellate tribunals to take evidence to correct mere formal defects or to supply deficiencies in the record or in the evidence, the committee maintained, was a serious defect in our procedure.

Principle IV. All clerks and other employees of court and all persons having permanently to do in any way with the administration of justice should be compensated by fixed salaries and all fees collected should be paid into the public treasury.

Most of the reforms of the last decade have been in the direction indicated in these principles. Substantial progress in their formulation into concrete provisions of constitutions and statutes has been made by the American Judicature Society.

The trend of opinion relative to judicial organization is indicated in the draft of an article on the judiciary for a new constitution in New York which was offered by a voluntary group of members of the bar organized for the study of professional problems. According to the opinion of this group, the general principles which seem essential to the desired efficiency of our judicial system are:

I. A single court: thus abolishing the anomalies of concurrent, conflicting, and limited jurisdictions.

II. A chief justice elected for a short term who shall himself appoint the justices of this court: thus preserving the immediate relation to the people of the judiciary, the executive, and the legislative, yet preserving their relative independence.

III. This appointive judiciary to hold office for life or during good behavior, and with a prospect of retirement on a reasonable pension.

IV. The rules of court and procedure, the creation of terms, the assignment of judges, the adaptation of the judicial machinery to developing conditions, all to be controlled by a judicial board: thus relieving us of our cumbersome code, our constant legislative interference, and the inelasticity of our present system.

V. Masters who shall dispose of all interlocutory or procedural mat-

ters: thus leaving the judges free to try issues and—it is hoped—greatly reducing the volume of appellate business.

VI. A committee of discipline having power over bar and bench alike: thus insuring a uniform standard of professional conduct throughout the state.

VII. The preservation of a probate office legally accessible in every county for unlitigated matters.[1]

Though there has been considerable discussion of the plan for a unified system of courts for the states, the plan has appeared too radical to receive the approval of the legislatures and is not well enough understood to secure general public support.

Next in importance to the unification and centralization in court organization is the requirement that courts have authority to make rules of procedure, subject, of course, to general principles and conditions prescribed by the legislature.

Authority to Make Rules of Procedure.—A unified court must be in a position to make such rules and regulations as seem advisable to secure the effective administration of justice. A remodeled court without this power would be helpless to improve present conditions. A large part of procedure is technical in character and deals with details concerning which the court, by its experience, can regulate effectively in the end that justice may be dispensed.

An attempt has been made to confer the rule-making authority upon the Supreme Court of the United States and upon the supreme courts of the states. The proposed act prepared by the Illinois Bar Association indicates the nature and scope of the power to be granted:

The supreme court shall have power, and it shall be its duty:

1. To prescribe rules of civil practice and procedure in the appellate and trial courts of record of the state.

2. To prescribe forms applicable to such rules.

3. To prescribe generally by rules of court the duties and jurisdiction of masters in chancery.

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[1] *Cf. Journal of American Judicature Society*, vol. i, no. ii (August, 1917), p. 4.

4. To make rules and regulations:

(*a*) For regulating the terms, sittings, and vacations of the appellate and trial courts of record of the state.

(*b*) For regulating the duties and mode of conducting the business of the clerks and other officers of such courts.[1]

A limited rule-making power has been granted to the municipal court of Chicago and to the supreme courts of Colorado, New Jersey, Michigan, and Texas. An attempt is made in the granting of the rule-making power to courts to provide greater flexibility for court procedure, to the end that justice may not be interfered with by mere technicalities. To this effect the New Jersey Practice Act of 1912 states that

> . . . these rules shall be considered as general rules for the government of the courts and the conducting of causes, and as the design of them is to facilitate business and advance justice, they may be relaxed or dispensed with by the court in any case where it shall be manifest to the court that a strict adherence to them will work surprise or injustice.

The movement to place the authority to make rules in the courts is making headway in all of the states. Alabama and Michigan directed the supreme court of each state, respectively, to control judicial procedure. In Virginia the legislature directed the supreme court to draft a schedule of rules. The work was deferred with the view of securing the co-operation of the Supreme Court of the United States in order to bring about uniformity of procedure. A constitutional amendment in California aimed to give the courts greater power over procedural matters. A bill before Congress aims to give the Supreme Court of the United States power to make and enforce rules of procedure in Federal suits.[2] One of the best illustrations of this reform in court organization is that embodied in the English Supreme Court of Judicature Act.

Court Reform in England.—By the Supreme Court of Judicature Act of 1873 the several courts of the realm

[1] *Journal of American Judicature Society*, vol. ii, no. vi (April, 1919), p. 181.

[2] T. W. Shelton, *Spirit of the Courts* (John Murphy Company, 1918), pp. 261–262.

were consolidated into a single Supreme Court with two permanent divisions; namely, a high court of justice and a court of appeal. The administration of the court is centralized and unified, with ample authority to subdivide for the purpose of an effective division of labor. Judges are appointed by the Crown and have a permanent tenure unless removed by the king on an address from both Houses of Parliament. A significant feature of the reform act is the arrangement by which details of practice and procedure are left to a committee of nine justices, including the Lord Chancellor. Under this provision, a complete code of procedure has been prepared by the justices relative to form and commencement of actions, pleadings, trial, judgment, execution, appeals, provisional remedies, special proceedings, and costs. To nearly every rule is added the provision that the court or judge may, "in the interests of justice or convenience, make such an order and on such terms as shall be deemed just." A critical observer of the English courts under this reformed code found that in the conduct of a trial little time was lost in selecting a jury, the examination of witnesses was seldom interrupted by objections, and the administration of justice in England was simple, direct, and inexpensive.

In addition to the rule-making power, judges in continental European countries are accorded much greater control over matters of procedure and trial, and their position differs in a marked degree from that of judges in the United States. One of the points of difference may well be illustrated by the Swiss Civil Code recently adopted, which provides as follows:

> The written law governs all matters to which either the letter or the spirit of any of its provisions refer. In the absence of a provision of such law applicable to the case, the judge shall decide according to the customary law and, in the absence of custom, according to the rule which he would establish were he acting as legislator. He shall base his decisions upon the solutions adopted by text writers and in judicial decisions.

A similar duty to render a decision in every cause, whether covered by the law or not, is contained in the French Civil Code, to the effect that "the judge who refuses to render judgment under the pretext of silence, obscurity, or inefficiency of the law may be prosecuted as guilty of denial of justice."

However necessary it may be for an effective system of administering justice to have a unified system of courts with rule-making authority in the hands of the courts themselves, it is claimed that many improvements might be made in judicial administration without waiting for complete reorganization. Courts for the trial of small claims, for conciliation and arbitration, and for commercial arbitration, are practical methods for improving judicial administration without serious changes in court organization.

Courts for Trial of Small Claims.—One of the chief weaknesses in our judicial machinery has been the inability to provide for a satisfactory method of disposing of small causes. Because of the expense involved, long delay, and inconvenience, the majority of the poor find it impossible to secure a settlement of small claims in the courts. To remedy this defect small-claims courts or courts of conciliation are being established. An illustration of the first class of courts is found in Kansas, where a statute provides for the appointment of a judge of a debtors' court "who is sympathetically inclined to consider the situation of the poor, friendless, and misfortunate." The judge is to serve without pay and is authorized to hold court in his home or place of business. The procedure is informal, no costs are to be assessed, and no lawyer is permitted to participate in the proceedings. The court is restricted to debts and accounts not exceeding twenty dollars, and to the service of those who cannot afford to employ counsel or use the regular courts. This act represents a rather violent reaction against the old formal method of trying small causes and appears to be an effort to sanction the method of legal

aid societies. Though certain marked defects are involved in the act,

> . . . the great accomplishment of these courts is that they have concretely demonstrated that justice administered without regard to procedural and evidential rules of law not only meets with popular approval, but also is entirely feasible; in other words, that as to small civil causes the three defects in the traditional administration of justice can be readily overcome.[1]

A court similar in purpose was established in Portland, Oregon. As in the Kansas Act, jurisdiction is limited to claims not exceeding twenty dollars. The proceedings are informal, "with the sole object of dispensing speedy justice." Costs are limited to seventy-five cents. This court, according to Mr. Smith,

> . . . is a great improvement over the Kansas model in that it secures the advantages of sympathy, cheapness, and speed, without sacrificing any fundamentals. It is justice by trained judges who, although given wide discretion by the statute, in fact decide cases according to substantive law and not their own arbitrary opinions of right and wrong. It is an entire breaking away from our traditional justice conducted according to procedural and evidential law, but its justice is nevertheless ascertained and administered according to substantive law.[2]

The court has been very successful. Out of a total of 1,828 cases in seventeen months only two cases have been appealed.

Another method to attain the same object is that of the conciliation branch of the municipal court of Cleveland. The procedure in this branch, established about the same time as the Kansas small-claims court, is so interesting as to deserve description:

> A person goes to the clerk of the conciliation branch, who has a separate office, exactly like a legal-aid society, where the person may feel at home and at liberty to talk the difficulty over with the clerk. If the dispute seems one that offers fair hope of immediate adjustment, the clerk, like a legal-aid society attorney, telephones or writes the defendant and endeavors to secure an amicable settlement. If that

[1] R. H. Smith, "Justice and the Poor," chap. i, p. 46. [2] *Ibid.*, p. 47.

fails, or if the case at once appears likely to demand judicial consideration, the clerk fills out in the court docket a very brief statement of claim, which the plaintiff signs. A date for the hearing—the defendant being entitled to three days' notice—is at once assigned, the plaintiff being given a little card bearing the date, the time, the court room, and the court address and telephone number. A summons is made out, and delivered to the bailiff, who deposits a copy in the mail box and certifies to that effect on the original summons. At first registered mail was used, but to-day ordinary mail is employed because in the event of a defective address it is returned more promptly. If the summons cannot be delivered, it is returned at once to the court and the bailiff amends his return of service. The summons states the precise time and the exact room for the hearing, and the case is tried at that time and place.

The small-claims court room is like any other court except that attorneys are noticeably absent. They are not excluded by law, but the attitude of the court and the opinion of the bar is to discourage their attendance. Omitting the conciliation feature for the moment, the court tries the case by letting the parties tell their stories, and by questioning them and permitting them to question each other. The court is as dignified, its proceedings are as orderly, it commands as much respect as a supreme court. The judgment rendered by the court is final on the facts, and an appeal on law goes directly to the court of appeals.

The court handles only matters involving less than thirty-five dollars. It is not limited to actions of contract or debt. All kinds of small matters, including torts, have been heard and determined. While the court has had no difficulty with actions of tort for the detention of personal property (particularly the retention of trunks and furniture under claims of landlord's or lodging-house keeper's liens), it has often found that its procedure is not adapted to torts for negligence, as in automobile collisions causing property damage. If parties appear with counsel, or with a large number of witnesses, or if the issues involve extended accounts or any problem not adapted to informal treatment, the case is transferred from the small-claims court to the regular trial court, which is accomplished merely by the judge's direction to that effect, inasmuch as both courts are simply departments of the one municipal court.

The work of the small-claims court may be summarily presented as follows:

Year	Cases Disposed of	Amount of Judgments
1913	2,367	$10,410.53
1914	4,719	20,752.64
1915	5,106	32,872.14
1916	5,182	

These statistics show only the cases that reach the trial stage. A large number are disposed of through the advice, correspondence, and negotiation of the clerk's office. A statement of this work appears in each annual report; that for 1916 gives an accurate idea of its extent. Two hundred and twelve money claims, amounting to $1,896.69, were settled without commencement of suit for $1,736.24; 106 were found on investigation to be without merit; and in 28 the plaintiffs dropped the proceedings. In 197 claims for the detention of personal property, 107 were settled by a surrender of the property on receipt of a letter from the clerk's office, 37 had no merit, and 13 were dropped by the claimants. The clerk assisted parties to institute 38 actions of replevin. There was much further miscellaneous work done. This is an excellent illustration of legal aid work performed under judicial direction, and at public expense.

The Cleveland small-claims court is unquestionably a remarkable institution. Like the Portland court, it is a branch or session of the regular municipal court, so that no difficulties of jurisdiction are created. It exists, not under statutory regulation, but under rules of the municipal court, which is a preferable plan because changes can be more readily made as needs arise or as experience may dictate; thus its limit of thirty-five dollars may at any time be raised. It is a court of election, not compulsion. The original rule requiring all cases involving amounts under thirty-five dollars to be entered on the small-claims docket was given up in favor of a rule requiring the clerk to place cases on the docket only when so requested by the plaintiff. The court may issue attachments, which the Portland court is forbidden to do, but their use is discouraged except in cases where the defendant's home address is unknown, but his place of work is known, so that garnishment serves to give the court jurisdiction and bring the claim to the defendant's attention. Speed is secured, most cases being heard and determined within a week after their filing; and the cost is extremely low, the total fees and costs amounting only to fifty-seven cents. The procedure is so simple that no pleadings at all are required.[1]

In Chicago a similar branch has been established in connection with the municipal court, and others are in the process of establishment. The Massachusetts legislature provided in 1920 that the justices of the district courts should adopt rules for informal procedure in small causes, and thus the first attempt has been made to establish simple and inexpensive procedure for small civil causes in

[1] R. H. Smith, "Justice and the Poor," pp. 49–50.

the regular system of courts of a state.[1] The great defects of the administration of justice in relation to small claims are eliminated in these courts, for there is no delay; costs are either abolished or lowered in order to give free access to the courts; and the expense of lawyers is rendered unnecessary by simple and informal procedure.

Courts of Conciliation and Arbitration.—One of the greatest deterrents in the administration of justice is the clogging of the judicial machinery and the consequent delay entailed by the trial of controversies which could be settled by means of arbitration and conciliation. Probably one-half or more of the cases which come into the courts of justice could be settled more reasonably and equitably by means of arbitration when the machinery for such settlement is provided. In European countries, particularly in France and in Germany, the judge is given the authority to act as arbitrator. Many minor controversies are settled by the hearing of both parties, with witnesses involved, and an adjustment is made by the judge, all of the parties agreeing thereto. Such courts of conciliation have been used extensively for commercial purposes in England and have been established in the United States, particularly in Cleveland, Chicago, New York, and other communities. It will be a step forward in improving the administration of justice when regular courts are provided and when the petty controversies can be settled without the expense of attorneys and the consequent delay of regular trials in courts of justice.

Conciliation.—The first step toward an amicable settlement of controversies consists in the frank telling, by both parties, of all they know about a matter. According to the principle of conciliation, which should occupy a conspicuous place in any complete system of administering justice, a neutral agency is established whereby parties to a controversy may meet without prejudice and disclose every

[1] For the rules adopted by the district courts, see *Journal of the American Judicature Society*, vol. iv (April, 1921), no. vi.

material fact. Conciliation procedure has been in effect for more than a century in Scandinavian countries and is held in such high regard that nothing could induce the people of these nations to abandon the system.

The machinery and the procedure of conciliation are extremely simple and inexpensive. The principle is applicable to nearly every kind of civil controversy. Briefly, the plan which has been proposed as a supplement to existing courts is that no civil action shall be commenced until the claimant shall have given the opposing party an opportunity to discuss a settlement in the presence of an assistant of the court known as a conciliator. If the party complained of does not appear in response, the conciliator certifies that the attempt at conciliation has been made and has failed, and the claimant is then entitled to obtain judicial process. If the defendant does appear, it is then the duty of the conciliator to hear the statements of both parties and their witnesses, and to suggest an amicable settlement agreeable to law and equity. If a settlement is reached, the conciliator will certify it to the court, which will docket it as a judgment. If there be no agreement, the certificate of failure will be granted. Disclosures made at the conciliation hearing are not admissible as evidence in any subsequent proceeding. The conciliator is presumed to be a person of good judgment, representing the principal trial court, and answerable to it for all his acts.[1]

In the latter part of the eighteenth century (1795), Norway and Denmark established courts of conciliation. Every city or village with sixty families or more was constituted a district. The court or commission is made up of two members, one acting as chairman and the other as clerk. Commissioners are elected for a term of three years. The proceedings of the courts are carried on behind closed doors and the commissioners are bound to secrecy. Law

[1] For a proposed act embodying these principles, consult *Journal of American Judicature Society*, vol. ii, no. v (February, 1919), p. 151.

courts will dismiss cases that do not come from the court of conciliation with a certificate of the commissioners attesting that an effort at conciliation of the parties has been duly made before them. A fee of twenty-five cents is charged for issuing the summons, to which is added fifty cents in the event conciliation is effected.

The commissioners receive no other compensation. Litigants must appear in person except in case of sickness or very pressing business engagements, when the use of a representative is allowed, provided, however, that such a representative is not a practicing attorney. Lawyers are rigidly excluded from the courts of conciliation, except, of course, when they attend in their own behalf. Each party tells his own story in his own language. In Norway 75 per cent of the cases arising are peaceably adjusted in courts of conciliation; while in Denmark, the percentage is increased to 90.[1]

Under the Danish Judicial Code, which took effect April 11, 1916, conciliation procedure is retained as a corner stone of the judicial system. The general principles and procedure are similar to those of Norway.[2] Conciliation is extensively used in the industrial courts of France, Switzerland, and Germany in the settlement of disputes between employers and employees. The first successful effort to introduce conciliation in the United States is the attempt to provide, in connection with the small-claims court of Cleveland, that the judge shall endeavor to effect an amicable settlement. A large proportion of cases are settled under this authority. The act creating the Minneapolis court of conciliation is probably the most carefully worked out attempt yet made to transplant in American soil the Norwegian theory of judicial procedure by way of conciliation as a substitute for the historic procedure of the common law. The conciliation court is established as a branch of

[1] See article by Nicolay Grevstad, on "Courts of Conciliation," *Atlantic Monthly*, vol. lxviii, p. 401; reprinted in the *Journal of American Judicature Society*, vol. ii, no. i, p. 5.

[2] See article by Axel Teisen, *Pennsylvania Law Review*, vol. lxv, p. 543.

the municipal court of Minneapolis. A special judge is to be appointed known as the conciliation judge. Any person having a claim within the jurisdiction of the municipal court may appear before the conciliation judge or his clerk and state his cause of action without pleadings and without formality. A time is set for the hearing, which must be within ten days from the date of entry or filing. The defendant is summoned, and if he fails to appear, a default judgment will be entered against him. In cases involving more than fifty dollars the court is purely one of conciliation; for smaller amounts the settlement has the force of a judgment.

No procedure whatever is prescribed for cases before the conciliation court save that the parties to the action must appear in person. Attorneys are not allowed to participate in any manner whatever in the proceedings. No costs are required of either party, but the judge may, at his discretion, include in the settlement the actual disbursements of the prevailing party, if it seems to him just to do so. The judges of the municipal court are expressly empowered to prescribe such rules as to procedure, methods of producing evidence, and general conduct of the case, as may be deemed necessary for carrying out the provisions of the act.

The New York Municipal Court Code, issued in April, 1917, makes provision for a system of "arbitration and conciliation" whereby the parties to a dispute may agree to arbitrate before a justice of the court or any other person. The agreement after the first hearing is binding on the parties. The arbitrator is not bound by the rules and may receive "such evidence as it may seem to him is equitable and proper." No record of the proceeding is kept, and no expense shall be incurred except upon the consent, in writing, of both parties. The plan for conciliation prescribes that a person may present a note of conciliation as to "any claim which in his opinion may be adjusted without resort to an action at law. The justice is instructed

to endeavor to effect an amicable and equitable adjustment between the parties."

The North Dakota legislature of 1921 has enacted a law to provide a plan of conciliation for an entire state.[1]

Commercial Arbitration.[2]—One of the interesting facts concerning British litigation is the almost total absence of commercial disputes from the calendars of the principal trial courts. The practice of commercial arbitration which has developed in England in the past forty years saves the courts a great amount of business. It is estimated that more than 100,000 causes are arbitrated every year. Arbitration differs from conciliation in that "it is a regular and recognized method sanctioned and governed by law, for the determination of rights and the enforcement of remedies, by which a party aggrieved may ascertain and obtain all that he is entitled to from his opponent, without instituting an action in the courts of law." The practice of arbitration is assured by the fact that trade agreements made in England contain, as a rule, a clause requiring the submission of disputes to arbitration.

While arbitration was practiced for centuries in England, the modern method had its beginning at the time of the American Civil War, when the Liverpool Cotton Association set up an arbitration committee to determine the many disputes arising in the cotton trade. The success of the efforts of the committee led to the application of the principle of arbitration to other controversies. Other trades established similar committees. In 1889 an act was passed consolidating and revising the law of arbitration and providing in a schedule a simple set of rules to govern the procedure in all arbitrations where no agreement to the contrary was made by the parties.

To-day, there is not a trade or professional organization

[1] For a copy of this act, which follows in large part a draft act prepared by the American Judicature Society, see *Journal of the American Judicature Society*, vol. iv (April, 1921), no. vi.

[2] *Cf.* Samuel Rosenbaum, "A Report on Commercial Arbitration in England," *American Judicature Society Bulletin*, no. xii, October, 1916.

in England that does not provide some means for the arbitration of disputes that arise among members or between members and others, and frequently between nonmembers engaged in similar work. The opportunity to benefit by arbitration has been one of the factors leading to the organization of almost every existing kind of trade. In every trade there has been developed a body of experts available as arbitrators, men who have mastered the mysteries and intricacies of their respective trades.[1]

Among the advantages of arbitration the elimination of questions of jurisdiction, the employment of experts in the business of a given trade, and a flexible procedure which can be adapted to the convenience of the parties and the character of the dispute are probably most noteworthy.

In the United States trades have not, until quite recently, been organized in such form as to develop a plan of arbitration similar to that in England. Progress has been made in educating public opinion by various commercial bodies and by members of the bar. The first definite step to legalize the procedure of arbitration was enacted in Illinois through the efforts of the Chicago Association of Credit Men and of Chief-Justice Harry Olson. It is the aim of the act to join the work of the arbitrators and that of the court so as to secure co-operation which will insure the best service of both. A complete set of rules and regulations for commercial arbitration has been prepared by a committee of the Chicago Board of Trade.[2] The municipal courts of Cleveland, Cincinnati, and Chicago are aiding in the effort to encourage arbitration. A series of rules to provide by agreement for the submission of disputes to an agreed arbitrator have been prepared by the judges of the municipal court of New York.

The chief defects of the administration of justice—delay, costs, and attorneys' fees—are eliminated in conciliation

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[1] Consult *Journal American Judicature Society*, vol. ii, no. ii (August, 1918), p. 43, for details as to the practice of arbitration.

[2] *Cf. Journal American Judicature Society*, vol. ii, no. ii.

and arbitration, which, as a voluntary method of settling disputes, serves to secure an amicable and fair adjustment and thus to relieve the courts of much unnecessary business.

The general principle underlying the establishment of courts of small claims, the extension of arbitration, and the efforts to reform judicial procedure in the regular judicial tribunals, has been characteristically summarized by Lord Chief-Justice Bowen as follows:

> I hope to see the day when in every case, whatever its character, every possible relief can be given with or without pleading, with or without formal trial, upon oral evidence or upon affidavits, as is most convenient; when it will not be possible for an honest litigant to be defeated by lack of means, by a mere technicality, any slip, any mistaken step in his litigation; when law will cease to be a mere game which may be won or lost by a particular move.

Another field in which the principles of judicial reform have been applied is that of domestic relations. For cases of this type, unification of jurisdiction and specialization by judges has to a great degree been accomplished in the domestic relations courts of such cities as Chicago, Cincinnati, New York, Philadelphia, and Boston. In these courts as in the small-claims courts and courts of conciliation delays and court costs do not seriously interfere with the administration of justice, and the expense of an attorney is either eliminated or provided at little or no expense to poor litigants.[1]

Justice Through Administrative Tribunals.—More important than the various courts established to remedy defects in the traditional method of administering justice is the effort to secure justice through administrative tribunals. "Such tribunals have sprung up with amazing rapidity, they have taken over an enormous amount of litigation formerly handled by the courts, and the law concerning administrative justice is the most rapidly growing branch of law in our entire jurisprudence."[2] The two leading types

[1] R. H. Smith, "Justice and the Poor," chap. xi.

[2] *Ibid.*, p. 83.

of these tribunals are the industrial-accident commissions and the public-service commissions.

In the settlement of claims by injured workmen, delay and costs resulted in gross injustice. The time and great expense involved rendered it practically impossible for an injured workman to secure justice. Out of this condition grew the contingent system and the ambulance-chasing lawyer.

> The contingent fee system brought about a thousand abuses of its own. It attracted undesirable persons to become members of the profession. Because the stakes were high and the players essentially gamblers it induced the unholy triumvirate of lawyer-runner-doctor conspiring together to win fraudulent cases. It has degraded expert testimony and served as a cloak for robbery through extortionate fees. Unquestionably it has done more than anything else to bring the bar into deserved disrepute.[1]

Under the workmen's compensation acts the contingent fee system has been in large part eliminated. The expense of counsel and other costs have been greatly reduced. The application of the law to individual cases has been put on a systematic basis, rendering an appeal unlikely. The settlement of the claims of injured workmen by industrial-accident commissions has proved so satisfactory that there is a movement to extend the method of such commissions to the adjustment of injuries to passengers on all railways.

The public service commissions, which were established to secure a more effective control over public utilities, have also developed a method of settling disputes through the aid of investigators and experts, which operates to the benefit of the poor litigant as well as to those more fortunately situated. The commissions investigate individual cases and often grant redress with little or no expense to the complainant. Frequently legal advice is given to the parties involved in controversies and steps are taken to effect a settlement by conciliation. Numerous complaints are thus disposed of quickly and satisfactorily which, under former

[1] R. H. Smith, "Justice and the Poor," chap. xi, p. 86.

conditions, would never have been presented to a judicial or administrative tribunal or would have dragged on indefinitely through the hierarchy of courts.

The future of such administrative tribunals, and what their ultimate status will be, is a perplexing problem. Some of the advantages of these commissions are due, no doubt, to the fact that they can administer claims and settle controversies free from the harassing restrictions of formal law. But administrative tribunals tend to develop a law and practice of their own. As procedure becomes better defined it tends to follow more nearly the channels of regular judicial procedure and eventually the commissions may be merged with other courts in a reorganized judicial system. If such a union takes place it is quite clear that certain features of the administrative tribunals such as the use of investigators, simple procedure, and the automatic settlement of claims will be retained. Administrative tribunals, it has been well said, "have much to teach judicial tribunals about promptness, inexpensiveness, and limiting the attorney to clearly defined functions."[1] Furthermore the administration of justice is undergoing changes due to the results obtained by other sciences such as sociology and psychology.

Provision for Adequate Records and the Employment of Experts.—The courts of the United States have been slow to realize the necessity of full and complete court records in which the history of criminals is fully analyzed, and to utilize the advice of experts, particularly psychopathologists, sociologists, and criminologists, in examining those apprehended for crime and recommending treatment in accord with their mental, social, or physical deficiencies. The remarkable record of the municipal court of Chicago indicates the possibilities for development in this procedure. Every court will in due time have a complete and adequate system of records which will be in charge of experts trained in the science of criminology, and criminals will be treated

[1] R. H. Smith, "Justice and the Poor," chap. xi, p. 91.

in accordance with the developments of modern scientific knowledge as well as with the principles of legal justice and criminal law.

A more extensive use may be made of the parole system and the indeterminate sentence. Many who are apprehended for crime can, under the parole system, be returned to their regular occupations and be held under surveillance until all danger of recurrence of the original breaking of the law may be removed. By the provisions of the indeterminate sentence it is possible for those in charge of the prisoners to examine carefully those who show signs of improvement and to return them to normal conditions. Thus the sentence may be shortened for many who would otherwise be held indefinitely and probably be forever lost, so far as a return to decency and right conduct is concerned. Furthermore, the conditions and quarters of prisoners are being improved, and the former cell system in some instances has been eliminated. Some sort of cottage system with provision for working out of doors and in factories, along with industrial training, will tend to restore to useful and peaceful occupations the majority of those who by some misstep or willful breaking of the laws become wards of society and in need of its protection. The experience of Montpelier, Vermont, and of other cities where those apprehended for crime have been put to useful work under a system of parole and supervision demonstrates that the majority of criminals can be restored to usefulness and effective work, and that this method is far superior to the old plan of incarcerating those apprehended for crime and holding them under conditions which degrade and make it often impossible for them to be restored to respectable citizenship. According to a recent estimate, the United States spends annually $500,000,000 more in fighting crime than on all its works of charity, education, and religion. It is needless to argue that such a condition ought not to continue.

The application of a new science in the administration

of justice is revolutionizing some of the former methods in dealing with delinquents and criminals. A new science known as psychopathology, or the science of mental abnormality, includes a study of all of the defects of the individual, physical as well as mental. The psychopathologist must be a specialist in medical science, and, in view of the intimate relation between physical and mental abnormality and degeneration, he needs to be a neurologist. Finally, he must be a psychiatrist, versed in all the subtle knowledge of mental diseases. Thus equipped and permitted to co-operate with the court, there is now opportunity for the psychopathologist to penetrate the mysteries of personality, to know and classify the individual delinquent in a large proportion of cases, and to give a prognosis of remarkable validity upon which a conscientious judge can base a judgment.[1]

The first court to apply this method in a definite and effective way was the juvenile court of Chicago, where, under the direction of Chief-Justice Olson, the first laboratory was opened in 1914 and placed in charge of a specialist in psychiatry, Dr. William J. Hickson. The results accomplished in this laboratory have not only demonstrated the value of this science in dealing with delinquents, but also have indicated extensive possibilities in the further development of mental and physical examinations as an aid in the administration of justice.

A generation ago lawyers and justices were loath to admit any defects or weaknesses in the legal system of the United States. It was customary to laud the virtues of the common law and the courts and to express contempt at "futile legislative attempts to interfere with the inevitable course of legal history." The first attacks on the methods of administering justice were so exaggerated as to receive but scant support. But the persistence of attacks and the accumulation of evidence on the failures of judicial administration have changed the attitude of the bar. "Every-

[1] *Journal of American Judicature Society*, vol. ii, no. iii (October, 1918), p. 71.

where there have come to be lawyers who are willing to stand for active efforts toward improvement."[1] The situation as it faces the legal profession to-day is admirably stated by Dean Pound:

In any practical program for the improvement of judicial administration of justice in the United States, there must be four cardinal items. First, and in many ways most important, is the personnel of the bench, the mode of choice and tenure of judges. Because of the connection of the bench with enforcement of the criminal law, and the judicial power with respect to unconstitutional legislation, we have been too much engrossed with the political aspect of the judicial office. In consequence more than one of our commonwealths has realized the truth of Bacon's saying, "An ignorant man cannot, a coward dares not, be a good judge." The everyday adjustment of relations of individuals with each other and with the state is less in the public eye than the occasional matters of spectacular interest that come before tribunals under our Anglo-American doctrine of the supremacy of law. But accurate and speedy adjustment of these relations is at the bottom of the social order. We must keep in mind the requirements of everyday administration of justice, and foremost among these is the strong, independent judge. Second, we may put organization of courts, the unification of the judicial system, in such wise as to permit the entire judicial force of the commonwealth to be employed in the most effective manner possible upon the whole judicial business of the commonwealth, making adequate provision for speedy and expert disposition of petty causes, for organization of the clerical and administrative side of the courts, and for adequate and responsible supervision of every phase of judicial business. Third, we may put, what is often put first, but must depend for its effectiveness largely upon the two preceding items —simplification of procedure and relegation of procedural machinery to its legitimate place in the administration of justice. Last, but by no means least in importance, is organization and training of the bar.

To some extent the American Bar Association has busied itself for many years with each of these items in a comprehensive plan of law reform. State bar associations, too, are more and more taking them up. More recently the American Judicature Society has been at work upon them. But in the end our main reliance must be upon critical study of the local aspects of these several problems by lawyers who have first taken the trouble to acquaint themselves with the general principles involved, to learn how far the problems are general and how

[1] Roscoe Pound, in Introduction to the *Spirit of the Courts*, by Thomas W. Shelton (John Murphy Company, 1918), p. 12.

far local, and to acquire accurate information as to the experience of the rest of the world in dealing with them.[1]

A proposal which, it is thought, would aid greatly in improving the legal profession is an incorporated association of the bar of the state to include all practicing lawyers, and to exercise large powers with respect to admission to the bar and discipline of its members.[2]

The Problem of Securing an Efficient Judicial System.— The problem of securing an efficient judicial system in the United States involves, then, it is generally agreed, certain essential changes in court organization and procedure. Among these changes are the unification of courts under a flexible form of organization which can be adjusted so as to dispose effectively of judicial business; rule-making power in courts and the simplification of judicial procedure in order to remove obstructive tactics and technicalities which entail delay and high costs of litigation; and to provide an informal and inexpensive procedure for the trial of small claims and for minor controversies which can readily be disposed of by some form of arbitral procedure. These changes, however, will not bring the desired reformation in judicial administration unless the judges selected for the bench have the training and qualifications to administer the system with scientific care and accuracy and with a spirit of fairness and justice that inspires public confidence. Such judges, when selected, must be assured of permanent tenure during good behavior and faithful performance of their duties. Nor will the administration of justice be greatly improved until more and better professional training is required of those who enter legal practice and a higher standard of legal ethics is formulated and enforced by the bar associations. Although progress in the introduction of the above reforms has been slow and halting, public sentiment is developing which argues well

[1] Thomas W. Shelton, *Spirit of the Courts* (John Murphy Company, 1918), pp. 14–15.

[2] For a model Bar Association Act, see *Journal of American Judicature Society*, vol. ii, no. iv (December, 1918), p. 111.

for an early adoption of the main features of the above program.

Despite apparent weaknesses and defects, the American judicial system stands forth as one of the achievements of the founders of government in state and nation. Nowhere has such a heavy responsibility been placed upon the judicial department. It is surprising that these responsibilities have been discharged so efficiently as to call forth so few criticisms and attacks. And whatever changes may be undertaken must be conceived and executed with sufficient caution and reserve not to interfere with the main principles of the administration of justice which have been demonstrated as necessary and efficacious through centuries of trial and experiment. To develop a spirit of distrust and dissatisfaction with the fundamental institutions of securing justice without demonstrating ways of reform which can readily be adopted, would be to lead in the direction of disaster. On the other hand, to uphold the existing order and to be unwilling to consider changes and improvements would inevitably lead to results even more disastrous—namely, unrest and ultimate revolution.

The problem, then, in court reform, as in the introduction of changes in other departments of government, is to build upon the foundations of organization and practice which have been proved successful, and to make such changes as seem consistent with these foundations to adjust judicial machinery to meet the extraordinary conditions which have developed as a result of the complex conditions of modern life.[1]

"I do not think," says Elihu Root, "that we should be over-harsh in judging ourselves, however, for the shortcomings have been the result of changing conditions which the great body of our people have not fully appreciated. We have had in the main, just laws and honest courts to which people—poor as well as rich—could repair to obtain justice. But the rapid growth of great cities, the enormous masses

[1] *Secure and discuss a plan for judicial reorganization in your state. Cf. "Bulletins of the American Judicature Society" for model acts.*

of immigrants (many of them ignorant of our language), and the greatly increased complications of life have created conditions under which the provisions for obtaining justice which were formerly sufficient are sufficient no longer. I think the true criticism which we should make upon our own conduct is that we have been so busy about our individual affairs that we have been slow to appreciate the changes of conditions which to so great an extent have put justice beyond the reach of the poor. But we cannot confine ourselves to that criticism much longer; it is time to set our house in order."[1]

SUPPLEMENTARY READINGS

"Justice Through Simplified Legal Procedure," *Annals of the American Academy of Political and Social Science*, Vol. LXXIII, No. 162.

Bulletins of the American Judicature Society, Vols. I–XIV.

See especially:

No. X. "The Selection, Tenure, and Retirement of Judges."
No. VII. "A Second Draft of a State-wide Judicature Act."
No. XII. "A Report on Commercial Arbitration in England," by Samuel Rosenbaum.
No. VI. "Organization of Courts."
No. VIII. "Informal Procedure."

The bulletins and journal of the American Judicature Society furnish information on the chief problems of judicial administration, with a summary of concrete proposals to aid in the process of reorganization. The function of the society is "to promote the efficient administration of justice." Headquarters, 31 West Lake Street, Chicago; Herbert Harley, secretary.

Reginald Heber Smith, "Justice and the Poor," *Bulletin of the Carnegie Foundation for the Advancement of Teaching*, No. XIII.

The following articles by Roscoe Pound, Dean of the Harvard Law School, discuss suggestively the conditions prevailing in the administration of justice, with some proposed reforms:

"Puritanism and the Common Law," 45 *American Law Review*, 811.
"Law in Books and Law in Action," 44 *American Law Review*, 44.
"Spurious Interpretation," 7 *Columbia Law Review*, 379.
"Mechanical Jurisprudence," 7 *Columbia Law Review*, 605.
"Liberty of Contract," 18 *Yale Law Journal*, 454.
"Enforcement of Law," 20 *Green Bag*, 401.
"Common Law and Legislation," 21 *Harvard Law Review*, 383.
"Social Problems and the Courts," 18 *American Journal of Sociology*, 331.
"Legislation as a Social Function," 18 *American Journal of Sociology*, 755.
"Justice According to Law," 13 *Columbia Law Review*, 696.

[1] Foreword, R. H. Smith, "Justice and the Poor."

"Inherent and Acquired Difficulties in the Administration of Punitive Justice," *American Political Science Association Proceedings*, Vol. IV, p. 22.

"Causes of Popular Dissatisfaction with the Administration of Justice," *American Bar Association Reports*, Vol. XXIX, p. 395.

THOMAS W. SHELTON, *The Spirit of the Courts* (John Murphy Company, 1918).

JULIUS HENRY COHEN, *Commercial Arbitration and the Law* (D. Appleton & Co., 1918). See especially Part I on the relation of commercial arbitration to public policy, and the Appendix on examples of rules and regulations for the practice of commercial arbitration.

Part IV

SOME SPECIAL PROBLEMS IN THE OPERATION OF GOVERNMENT

CHAPTER I

THE BUDGET AND SOME FINANCIAL PROBLEMS

Nature and Scope of Federal Expenditures

The field of government finance includes three divisions, namely—revenue, expenditure, and debt. Each of these divisions deserves the careful consideration of those interested in government problems, but only one, expenditure, can be discussed in the limited space available. Revenue and debt are usually treated briefly in works on economics and more fully in volumes dealing with public finance. Therefore, to appreciate fully the great problems of government finance it is necessary in connection with the ensuing chapter to consult treatises on economics and public finance.[1]

Financial problems are, in many respects, the most difficult of all matters involved in the administration of government. A few figures as to the growth of Federal expenditures may help to suggest the immensity of the task which confronts those in charge of government finance.

The growth of expenditures of the Federal government may be illustrated by the amounts spent each tenth year since 1800:

1800	$10,813,000
1810	8,474,000
1820	18,285,000
1830	15,141,000
1840	24,314,000
1850	40,948,000
1860	63,201,000
1870	293,657,000

[1] See especially F. W. Taussig, *Principles of Economics* (The Macmillan Company, 1912), and C. C. Plehn, *Introduction to Public Finance* (Fourth Edition), (The Macmillan Company, 1920).

1880	$264,847,000
1890	297,736,000
1900	487,713,000
1910	659,705,000
1920	5,686,005,000[1]

Periods of extraordinary expenditure were 1862 to 1865, when the amount rose from about 470 millions to 1,295 millions, and 1916 to 1920, when expenditures were made as follows:

1916–17	$1,147,898,000
1917–18	8,966,532,000
1918–19	17,855,609,000[2]

The complex features of the financial problems of the Federal government may be better understood by analyses prepared by Dr. E. B. Rosa, Chief Physicist in the Bureau of Standards, Washington, D. C. An analysis of the appropriations for all branches of the government service for the fiscal year 1920 shows that

> 3 per cent of the total budget was appropriated for general governmental purposes (legislative, executive, and judicial), 3 per cent for public works, 1 per cent for research, education, and development, and 93 per cent for the army and navy, railroad deficit, shipping board, pensions, war-risk insurance, and interest on the public debt, all of which are either obligations arising from the war or for preparation for possible future wars.[3]

But since the appropriations for 1920 were greatly affected by the results of war and postwar conditions, and since it is impossible to gauge expenditures by means of appropri-

[1] Amount appropriated by Congress for the current year. Expenditures have not yet been announced. These figures are based largely upon the tables presented by D. R. Dewey in *Financial History of the United States* (Longmans, Green & Co.). See also "The Growth of Federal Expenditures in the United States," by C. J. Bullock, in *Selected Readings in Public Finance* (Second Edition), (Ginn & Co., 1920), p. 47.

[2] Based on tables prepared by E. L. Bogart, in "Direct and Indirect Costs of the Great World War," *Preliminary Economic Studies of the War*, No. 24, Carnegie Endowment for International Peace (Oxford University Press, 1919).

[3] "Scientific and Engineering Work of the Government," *Mechanical Engineering*, February, 1921; for details of above analysis *cf.* by the same writer "The Economic Importance of the Scientific Work of the Government," *Journal of the Washington Academy of Sciences*, vol. x, no. xii, pp. 341–382.

ations bills, Doctor Rosa made a study of Federal expenditures for the ten-year period from 1910 to 1919. From this study four charts were prepared which show the relative

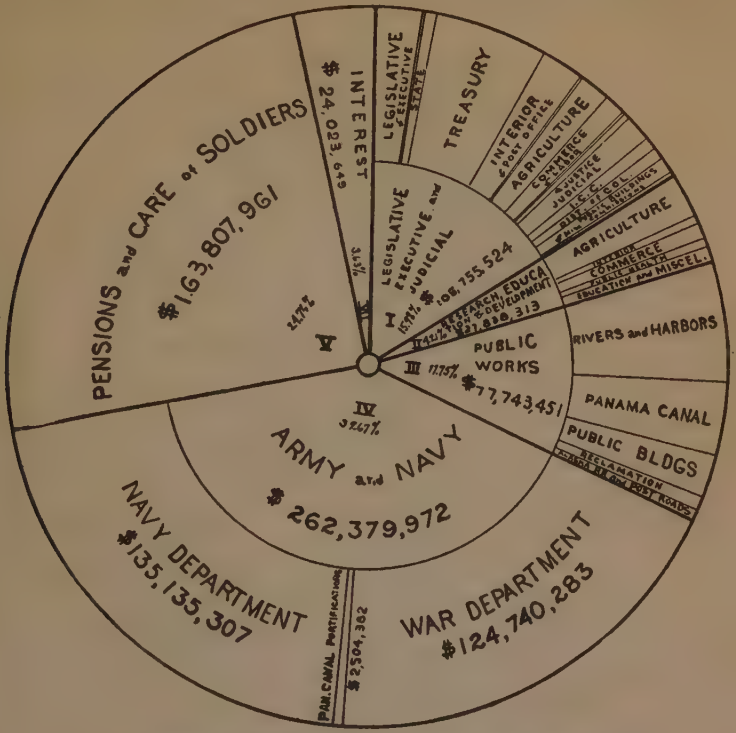

FIG. 1 AVERAGE NET EXPENDITURE OF FEDERAL GOVERNMENT, 1910 TO 1919, EXCLUSIVE OF WAR COST

Average Yearly Total.... ..... $661,548,870
Average Yearly Civil..... ..... $211,337,288

proportions of money expended for various purposes by the Federal government.[1]

The present situation, then, may be briefly summarized: The Federal government, as a result of participation in the Great War, has a very large debt, with other heavy annual charges caused by the war. The interest on this debt com-

[1] These charts from *Mechanical Engineering*, February, 1921, are used by permission of author and publishers.

bined with the current cost of the army and navy requires for the present more than 90 per cent of the total expenditures. Though this high percentage will be reduced somewhat as the war charges and the debt are decreased,

FIG. 2 AVERAGE ANNUAL NET EXPENDITURE OF FEDERAL GOVERMENT DURING THE PERIOD 1910 TO 1919, FOR GROUPS I, II AND III—CIVIL ACTIVITIES, $211,337,288

the cost of past and prospective wars along with the security and protection involved, will, in all probability, seldom run as low as 75 per cent. In the 1920 finance bill public works and the necessary administrative cost of conducting the Federal government were allotted slightly more than 6 per cent and 1 per cent remained for research,

education, and general developmental functions. The problem obviously involved in this analysis is whether in the interest of peace, progress, and national development these proportions ought not to be changed. Is it reasonable

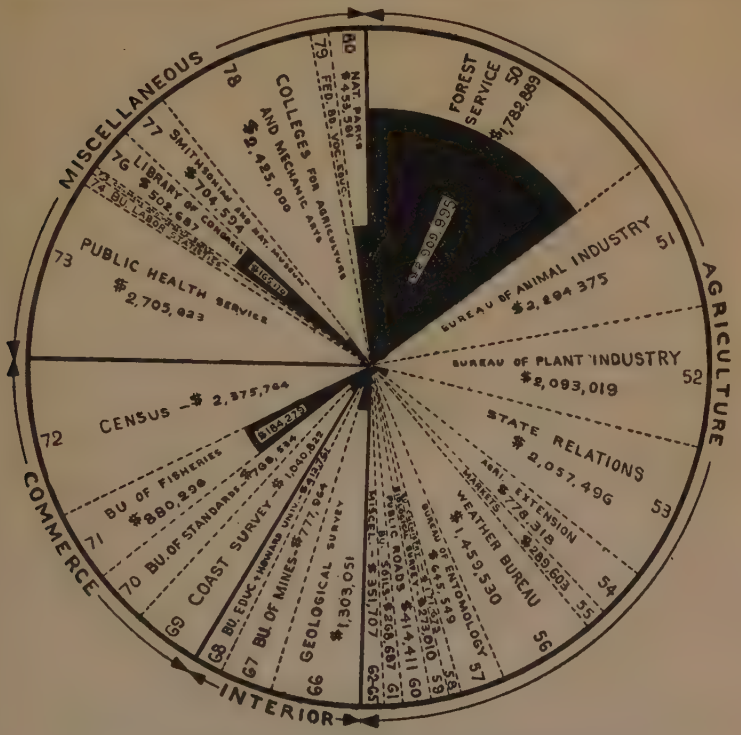

FIG 3 AVERAGE ANNUAL EXPENDITURES AND EARNINGS FROM 1910 TO 1919 FOR GROUP II—RESEARCH, EDUCATION, AND DEVELOPMENT

Total area of each sector represents gross disbursement; black area represents receipts; white area represents net expenditure.

to have so small a proportion of the national income go toward the constructive work such as is involved in scientific research, in the promotion of education and in the development of commerce, agriculture, and industry?[1]

[1] E. B. Rosa, *The Economic Importance of the Scientific Work of the Government, op. cit.*, pp. 375 ff. for the arguments in favor of an increase for research and developmental purposes.

At best the legitimate cost of running the government of the United States is bound to be very large. But, unfortunately, practices have developed in the appropriation and the spending of the nation's money which are occasion-

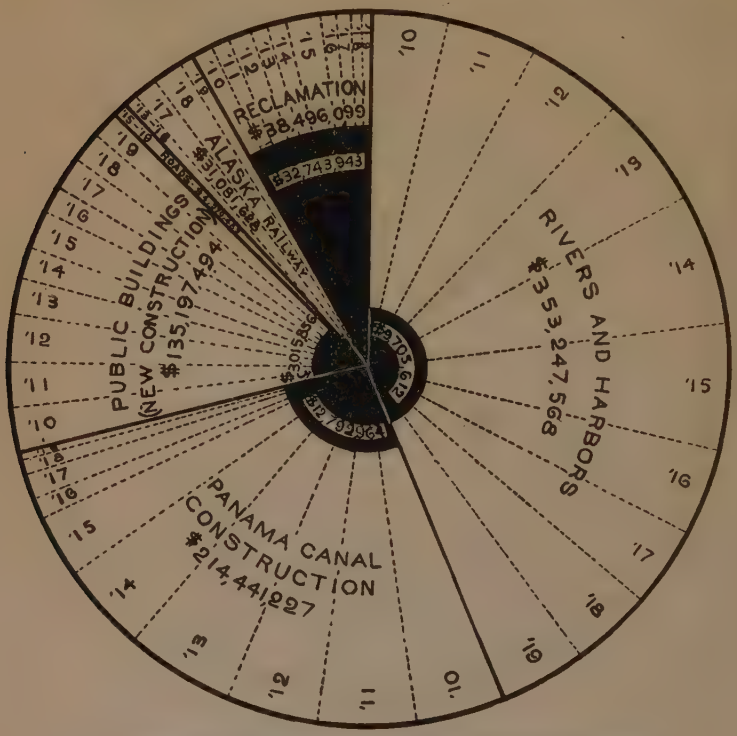

FIG. 4 AGGREGATE EXPENDITURES AND EARNINGS FROM 1910 TO 1919 FOR GROUP III—PUBLIC WORKS

Total area of each sector represents gross disbursement; black area represents receipts; white area represents net expenditure.

ing a widespread impression that the revenues of the government are often extravagantly and unwisely spent. Before considering the methods involved in the preparation of the Federal appropriation bills it is necessary to deal briefly with a few of the practices which have tended to cast discredit upon the national system of finance.

"Log-rolling" and the "Pork-barrel System."—The haphazard and wasteful methods practiced in the making of public expenditures in the United States have become so notorious as to win the opprobrious epithets "log-rolling" and "pork-barrel system." "Log-rolling," a term taken from the pioneer's custom of exchanging help in the clearing of land and the building of log cabins, has been applied to an arrangement between legislators whereby one champions the proposal of another in order that his own pet project may be supported. Similarly, the term "pork barrel" is reminiscent of life on the old southern plantations, when the opening of a barrel of pork for distribution among the slaves caused a rush upon the barrel, and it seemed aptly to symbolize the rush made upon the public treasury to secure appropriations for local interests.[1]

The system operates especially in the voting of appropriations for rivers and harbors, for public buildings, and for private pensions. "Pork barrel" methods seem to have developed first in connection with the river and harbor legislation, when separate bills for such improvements were combined into an omnibus bill of the type which is now enacted at each regular session of Congress. The features of this system in relation to river and harbor legislation have been suggestively summarized by Doctor Maxey:

1. Each omnibus bill is prepared by a committee (or better, perhaps, by two committees, as there is a committee in each branch of Congress to which river and harbor legislation is confided), and the members of the committees, being human, naturally take care to include all of their own pet items in the bill. No collusion is necessary to accomplish this, because very few committeemen have the temerity to object to items desired by another member of the committee. Such action would be a breach of courtesy and would endanger the items desired by the objecting member.

2. Spurred by pride and ambition for political success, the committee

[1] *Cf.* C. C. Maxey, "A Little History of Pork," *National Municipal Review*, vol. viii (December, 1919), p. 691; see also Hon. Joseph E. Ransdell, "The High Cost of the Pork Barrel," *Annals of the American Academy of Political and Social Science*, vol. lxiv (March, 1916), p. 43.

desires to frame a bill that will win favor in Congress and that will pass by comfortable majorities. To accomplish this in the case of a bill making appropriations to numerous local points, it is necessary to admit into the bill enough items for the various states and congressional districts to enlist the enthusiasm and support of a majority, although not all of these items may be of the most commendable type.

3. Members who have not profited by either of these distributions of "pork" lay siege to the committee with a combination of cajolery, imprecation, and fulmination that usually breaks the none too inflexible will of the committee.

4. The bill proceeds through the House under the convoy of steam-roller procedure controlled by the committee, so that there is very little chance for debate or amendment; or if the committee has failed to frame a bill which commands sufficient votes to pass in this manner, the revolt in the House will not deign to defeat the bill, but simply to add to its items.

5. Since both Houses act independently and one seldom accepts without amendment a bill passed by the other, it is necessary to have some agency to smooth out the differences between the two respecting each bill. This is a temporary joint committee known as a conference committee. In the conference committee an omnibus river and harbor bill receives its final touches, for it is usually either the report of the conference committee or no legislation at all. And the conference committee, be it noted, is in no way emancipated from the influences and motives that have been described in the foregoing paragraphs.[1]

Repeated efforts have been made to improve the system of granting money for rivers and harbors through an omnibus bill, in the passing of which these log-rolling and pork barrel methods prevail. Yet during the consideration of the recent river and harbor bill of March 2, 1919, Representative Frear of Wisconsin contended that the bill appropriating $27,000,000 for more than 200 different projects

. . . could never pass Congress, but for the fact that it contained over 100 old projects and 70 new projects with additional surveys scattered from Maine to Mexico and to the Pacific Coast, all of which bring votes to the bill. Not one item out of three, presumably, would get through if presented to the House singly, but in an omnibus bill everything goes.[2]

[1] *Cf.* C. C. Maxey, "A Little History of Pork," *National Municipal Review*, vol. viii (December, 1919), p. 693.

[2] *Congressional Record*, vol. lvii, p. 946, cited in article by C. C. Maxey, "A Little History of Pork," *National Municipal Review*, vol. viii (December, 1919), p. 695.

It is frequently charged by Congressmen that a river and harbor bill is not reported until sufficient votes to pass it are assured.[1] President Cleveland, in explaining a veto of a typical river and harbor bill, said: "There are 417 items of appropriation contained in this bill. Many of the objects for which it appropriates public money are not related to the public welfare, and many of them are probably for the benefit of limited localities or in the aid of individual interests."

But the process of log-rolling in Congress and the iniquitous features of pork-barrel methods are not confined to river and harbor bills. They are found also in public building bills, in pension legislation, in appropriations for the army and navy, as well as in other phases of Federal expenditure.

The introduction of pork-barrel methods into the granting of funds for public buildings appears to have come with the passage of the first omnibus bill, on June 6, 1902,[2] which Representative Sulzer of New York declared to be "a demonstration of the cohesive power of public plunder."[3] The effect of this change on public-buildings legislation, says Doctor Maxey, is that "there has been an avalanche of buildings since the pork barrel became operative." . . . More than 80 per cent of the building authorizations by Congress since 1789 have been since 1902. In other words, more than four times as many buildings have been provided for in 17 years under the sway of the pork-barrel system than under 113 years of unsystematic log-rolling."[4]

But the most astonishing feature of public building legislation is the placing of large and costly buildings in small towns, whether the needs of the community require a public building or do not. According to the Postmaster-General "many buildings are erected in cities where the cost of janitor service alone exceeds the amount necessary

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[1] See *Congressional Record*, vol. xxxii, p. 1355; vol. xxxv, p 3098.
[2] *Cf.* C. C. Maxey, "A Little History of Pork," *National Municipal Review*, vol. viii (December, 1919), pp. 695–696. [3] *Ibid.*, p. 696. [4] *Ibid.*, p. 696.

to secure satisfactory quarters" for the postal service.[1] Some characteristic examples of such appropriations are cited by Doctor Maxey:[2]

City or Town	Population	Cost
Aledo, Illinois	2,144	$65,000.00
Bad Axe, Michigan	1,559	55,000.00
Bardstown, Kentucky	2,136	70,000.00
Basin, Wyoming	763	56,000.00
Stone Gap, Virginia	2,590	100,000.00
Buffalo, Wyoming	1,368	69,000.00
Fallon, Nevada	741	55,000.00
Gilmore, Texas	1,484	55,000.00
Jellico, Tennessee	1,862	80,000.00
Vernal, Utah	836	50,000.00

No doubt the retention of the omnibus bill and the persistent demands made by small towns ranging in population from several hundred to 3,000 will continue to result in large appropriations for public buildings for which there is no need.

According to Senator Ransdell, it is in pension legislation that the pork-barrel methods have had the most pernicious results. Up to 1916 more than five billions of dollars were appropriated for pensions—"a sum more than six times as great as all river and harbor appropriations during the same period, and two thirds more than all navy expenditures during that time."[3] Our pension disbursements in 1913 were $176,714,000[4]—five times as much as those of France, seven times as much as those of Germany, ten times as much as those of Great Britain, and twenty-three times as much as those of Austria-Hungary. These four great European powers combined spent for pensions that

[1] *Cf. Annual Report of the Postmaster-General*, 1915.

[2] "A Little History of Pork," *National Municipal Review*, vol. viii (December, 1919), pp. 696–697.

[3] Senator Joseph E. Ransdell, "The High Cost of the Pork Barrel," *Annals of the American Academy of Political and Social Science*, vol. lxiv (March, 1916), p. 49.

[4] The amount disbursed in the payment of pensions in 1919–20 was $213,295,314.

year only $84,000,000, or less than one half as much as the United States.

In addition to most liberal and favorable general laws by which practically every worthy case could be provided for, Congress has added to the increasing demand on the public treasury by the enactment of thousands of private pension bills. In the words of Senator Ransdell:

> Our pension laws are liberal, very liberal; in fact, they practically give a service pension, and every surviving Civil War veteran is believed to be on the rolls. Liberal as are these laws, they do not include all who desire pensions, and covering these cases, special bills are introduced giving a pension to, or increasing the pension of, some individual. Sometimes the bill is to correct the military record of a deserter and grant him an honorable discharge, so that he may draw a pension under the existing law. Since 1861 Congress has allowed 47,398 pensions by means of special acts. Of these 21,648, with an annual value of $6,640,722, are still on the pension roll. The Sixty-third Congress passed 5,061 private pension bills at an annual cost to the government of $1,526,598.[1]

The growth of special pension grants may be indicated by the following: Between 1861 and 1908, a period of 47 years, 19,738 special pension grants were made; but from 1908 to 1916 the number was 29,367.[2]

A few instances showing the effect of the same methods in the enactment of other items of appropriation bills will indicate how general and widespread the system is in its operation.

In the first place navy yards have been continued on the solicitation of members of Congress despite the repeated declaration of the Navy Department that such yards are of no use. Professor Ford[3] cites a notable instance of this kind:

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[1] Senator Ransdell, "The High Cost of the Pork Barrel," *Annals of the American Academy of Political and Social Science*, vol. lxiv (March, 1916), p. 53.

[2] C. C. Maxey, "A Little History of Pork," *National Municipal Review*, vol. viii (December, 1919), p. 699.

[3] H. J. Ford, *The Cost of the National Government* (Columbia University Press, 1910), p. 48.

Senator Tillman of South Carolina, who is blunt of speech, has declared that when general stealing is going on, it is his business to see that his state gets its share. In the course of Senate debate he candidly declared: "The whole scheme of river improvement is a humbug and a steal; but if you are going to steal, let us divide it out, and not go on complaining." When the naval appropriation bill was before the Senate in 1899, he remarked: "We have a little orphan of a naval station down in South Carolina, for which I am trying to get a few crumbs of this money which is being wasted."[1]

But when Senator Tillman gets what he has described as his share of the steal, that does not prevent him from censuring the administration for extravagance; and, in general, while members of the minority take as large a hand in the grab-game as they can, they do not acknowledge any responsibility for the results. The fact that they help to produce these results is too patent to be denied by any respectable apologist, but it is contended that their participation is not such as to incur responsibility.

The humor of the situation was exhibited by Senator Hale. When the destruction of useless navy yards was urged, on the ground that they were too small to admit large ships, he expressed his opposition to the proposal by indicting Congress for building such monster vessels, stating that he was in favor of building smaller ships for which the navy yards might be retained.[2]

For the same reason army posts are maintained which the Secretary of War has frequently declared are an actual burden and detriment to army administration. Assay offices are continued which, as the Secretary of the Treasury reports, are "useless survivals."[3] And nonreservation Indian schools are supported by public funds, although the

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[1] "In this effort Senator Tillman has been remarkably successful. During debate in the Naval Appropriation bill in 1909 a tabulated statement of navy-yard expenditure was presented, from which it appears that in the six years 1902–1907, inclusive, the expenditure upon the Charleston Navy Yard aggregated $2,592,829.30. During that time no use at all was made of the yard for naval purposes and the value of the work done is officially returned as 'None.'" See *Congressional Record*, vol. xliii, no. lv (February 17, 1909), p. 2616.

[2] H. J. Ford, *The Cost of the National Government* (Columbia University Press, 1910), p. 52.

[3] C. C. Maxey, "A Little History of Pork," *National Municipal Review*, vol. viii (December, 1919), p. 701.

Commissioner of Indian Affairs has repeatedly recommended their abolition.

The decline of the control of the House of Representatives in financial affairs, which is one of the marked characteristics in the development of Federal government in the United States, has been due to the dominance of local and special interests and to the vicious system of log-rolling, whereby the members help one another to take care of local projects. Thus, in order to satisfy insistent Congressmen who yield to pressure from district interests, army posts are maintained which the military authorities have frequently condemned as unnecessary, navy yards are maintained which are of no use to the navy, post offices are built for which, according to the best judgment of the postal authorities, there is no demand, and ample provision is made for river and harbor improvements on streams which afford not the slightest chance of commercial navigation.[1]

The results of the system are aptly illustrated by a press dispatch relating to the presidential nominees of the major parties in the campaign of 1920:

Harding and Cox as Bill Authors

Their records in Congress are shown in the comparative table. Private pension and relief bills lead.

Bills Introduced	Cox (House)	Harding (Senate)
To pension private individuals	256	30
To increase individual pensions	502	57
For the relief of private individuals	23	8
For the relief of sundry building and loan associations in Ohio	—	17
For public buildings	7	—
To remove charges of desertion	21	—
To change names of steamships	—	5
All others	20	22
Total number of bills introduced	829	139

[1] *Report on instances of log-rolling and pork-barrel methods in "Congressional Record" for current session of Congress.*

SUMMARY.—James M. Cox, Democratic candidate for the Presidency, was a member of the House of Representatives from December 6, 1909, to January 8, 1913. The bills and resolutions which he introduced during that period amounted to 829, classified as above.

Warren G. Harding, Republican candidate for the Presidency, took his seat in the Senate December 6, 1915, resigning January 15, 1921. From December 6, 1915, to June 5, 1920, he introduced 139 bills, classified as above.

There is, then, in the present congressional system of finance a combination of influences and interests in favor of lavish expenditures, and there is no systematic effort to sift these expenditures and eliminate such as are not directly conducive to the public interest. Pork-barrel methods, with the consequent waste of public money, are largely due to the failure to introduce a satisfactory budget procedure in the Federal government. The unsatisfactory conditions affecting the control of national finances may best be revealed by a summary of the present budgetary practice of the Federal government and a comparison with the English budget system, which latter is one of the most effective systems in modern governments.

PUBLIC CONTROL AND THE BUDGET

Present Budgetary Practice of the Federal Government in the United States.—By the acts of September 2, 1789, and May 10, 1800, Congress made it the duty of the Secretary of the Treasury "to prepare and report estimates of the public revenues and the public expenditures" and to present "plans for improving and increasing the revenues from time to time for the purpose of giving information to Congress in adopting modes of raising the money requisite to meet the public expenditures."[1] Though the wording of these acts has been changed at various times to provide in effect that the "annual estimates for the public service shall be submitted to Congress through the Secretary of

[1] *Cf.* W. F. Willoughby, *The Problem of a National Budget* (D. Appleton & Co., 1918), pp. 131–132.

the Treasury," the result has been the establishment of a practice whereby the heads of departments prepare estimates for their respective services and the Secretary of the Treasury compiles and transmits them to Congress.[1] The original plan to have the Secretary of the Treasury present plans for improvement was never put into practice and the idea was gradually dropped. Neither the President nor the Secretary of the Treasury has assumed any responsibility to co-ordinate, eliminate, and adjust estimates.

The process of budget making in Congress according to present usage starts with the transmission of a letter from the Secretary of the Treasury to the Speaker of the House of Representatives, giving estimates of appropriations required for the public service. These estimates are given in minute detail. The Secretary acts in this regard in a purely ministerial capacity, passing on to Congress the estimates furnished by the several executive departments.[2] Current practice is thus summarized by Representative Tawney:

> The head of each department prepares his estimates, or the estimates for his department, without any reference whatever to the estimates submitted by the heads of other departments, and without any reference whatever to the estimated revenues for the fiscal year for which the estimated revenues were to be made.[3]

In this form the requests of the departments, bureaus, and divisions are submitted by the Secretary of the Treasury to the Speaker of the House of Representatives.

Jurisdiction over appropriations in the House is distributed among different committees, such as

Committee on Appropriations
Committee on Military Affairs
Committee on Foreign Affairs
Agricultural Committee
Naval Committee

[1] *Cf.* W. F. Willoughby, *The Problem of a National Budget* (D. Appleton & Co., 1918), p. 134.
[2] H. J. Ford, *The Cost of the National Government*, p. 11. [3] *Ibid.*, p. 13.

Post Office Committee
Committee on Indian Affairs
River and Harbor Committee

In addition to the estimates submitted by the Secretary of Treasury, supplemental estimates may be presented directly to the House at any time. The requests for appropriations may then come from five sources—namely:

1. Regular annual estimates transmitted by the Secretary of the Treasury.
2. Supplementary estimates, also submitted by the Secretary of the Treasury.
3. Judgments of the Court of Claims.
4. Reports of the engineers of the War Department.
5. Expenditures authorized by legislative acts during session.[1]

The general result has been the distribution of power among separate agencies without any system of unified control to co-ordinate income and expenditure.

It is customary in countries with representative government to place control over the budget in the hands of the body which most directly represents the electorate. In the United States provision was made in the Constitution by which this control was intrusted to the House of Representatives. In actual practice the Senate has gained more direct control over expenditures than the House.[2] It has thus come about that the House is the weaker of the two branches of the national legislature, and that the final action on appropriation measures is largely dependent upon the Senate.

The present situation in the handling of Federal finances is criticized by Dr. W. F. Willoughby of the Institute of Government Research. Doctor Willoughby says that

In scarcely a single respect do the present practices of our national government conform to the essential requisites of a sound system of national finance. No attempt is made to consider the whole problem of financing the government at one time. Expenditures are not con-

[1] H. J. Ford, *The Cost of the National Government*, pp. 15–17.
[2] H. J. Ford, *The Cost of the National Government*, p. 24 ff., for some illuminating instances of the power of the Senate.

sidered in connection with revenues. Even the idea of balancing the budget does not exist. Though the Secretary of the Treasury is required to lay before Congress each year the estimates of expenditures for the year to come, these estimates far from represent a consistent financial program. The essential basis for the elaboration of such a program exists neither in law nor in practice. Though the law requires all the estimates to be submitted by the Secretary of the Treasury, that officer acts as a mere compiling authority; he has no power to modify the proposals submitted to him by the heads of the administrative departments. The estimates thus represent little more than the individual desires of the departmental heads. The President, to be sure, might exercise his general powers to secure a co-ordination of the estimates and their conformity to a general policy. He, however, has no service through which he can effectively exercise such authority. There is absolutely lacking any organ at all corresponding in character or powers to the Treasury under the British system. The accounting and reporting system of the government is not such as to develop the information needed in order to construct a proper budget. No standard classifications of units of organization, functions, or activities, and of expenditures according to their character and object or service purchased have been officially adopted. No uniform scheme of expenditure documents calling for the recording of expenditure data in accordance with any general informational plan has been put into practice. The idea that a system of accounts should have for its purpose to produce information needed for the proper conduct of affairs, as well as to establish the fidelity with which legal provisions are carried out, scarcely exists. The estimates, such as they are, are not compiled in accordance with any one principle, nor in such a way that their significance can be clearly seen. There is no budgetary message, no proper scheme of summary, analytical and comparative tables. Nothing in the nature of a balance sheet is provided. The administrative reports are prepared without any reference to their service as supporting documents to the estimates, nor are they used to any extent for such purpose.[1]

After a careful survey the conclusion is reached that the national government has not taken any step toward the adoption of a real budget system.[2]

Budgetary Procedure in England.—By way of contrast with the financial methods of Congress an analysis of the budgetary procedure of the English government will be

[1] W. F. Willoughby, *The Problem of a National Budget*, pp. 55–57.

[2] For steps in the direction of the adoption of a partial budget system in the Federal government, see *infra*, p. 431.

suggestive. The fundamental principle of the English system of financial administration is that expenditures may be made only in pursuance of appropriations by act of Parliament. For more than a century this control has been exercised exclusively by the House of Commons. Although the ultimate authority to vote expenditures resides in the Commons, the most significant principle is that the House has conceived its function as inhering in the authority to pass upon proposals emanating from the Crown, now presented by his agents, members of the Cabinet, whose duty it is to formulate the financial program of the government.[1] By a standing order it was provided that

> This house will receive no petition for any sum relating to public service, or proceed upon any motion for a grant or charge upon the public revenue, whether payable out of the consolidated fund or out of money to be provided by Parliament, unless recommended from the Crown.

Parliament, then, has adopted the practice of considering no proposals for the expenditure of funds except such as are presented by the Cabinet, and no motion is entertained to increase the amounts recommended by the Cabinet. Owing to the fact that the Cabinet assumes responsibility for financial measures, reductions cannot be made without involving a change in the Cabinet. Although motions for reductions are sometimes made in Parliament for the purpose of discussion, such motions are withdrawn when the discussion is ended.[2]

The Ministry has adopted the policy of presenting, as far as is feasible, all of its financial proposals in one consolidated document, known as the budget. This procedure is merely a matter of administrative practice. When the budget is presented to Parliament it is considered in its entirety by the House acting as a committee of the whole.

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[1] W. F. Willoughby, W. W. Willoughby, and S. M. Lindsay, *Financial Administration of Great Britain* (D. Appleton & Co., 1917), p. 38.

[2] W. F. Willoughby, *The Problem of a National Budget*, pp. 59–60.

To make the provisions for a budget effective the Treasury Department is charged with the duty not only of preparing the budget, but also of supervising the execution of appropriation acts when passed by Parliament. In the exercise of its functions of supervision and control the Treasury Department has power to modify estimates submitted for inclusion in the budget, and its approval must be secured for any transfer of funds from one department to another. All changes in personnel or salaries must also receive the approval of the Treasury.

The contrast between the English and American systems of financial administration is tersely stated in the report to the Institute of Government Research:

> It is hardly necessary for us to point out the overwhelming importance of the principles embodied in these rules as a means of preventing ill-advised and wasteful expenditure of public funds. At one stroke it renders impossible the enormous abuses which prevail in the United States arising from the right possessed by individual members of Congress to propose and secure the consideration of measures calling for an appropriation of public funds. The exercise of that right, in conjunction with the device of "log-rolling," has not only given rise to the recurrent scandals of the "pork-barrel" public buildings and river and harbor bills, but has destroyed all possibility of framing and adopting a consistent and effective scheme or program of public expenditures. Under the British system each demand for funds originates with the head of the service for which the funds are requested, and thus represents the judgment of the person most competent to determine the real needs of the service. Under the American system demands for funds may, and often do, originate with individual members of Congress having little and, at best, inadequate, knowledge of the needs of the services for which they are intended. What is worse, they have no direct interest in the efficient and economical administration of such services. Their interest is in the localities to be served, which interest may be diametrically opposed to the interest of the services and of the public as a whole. In many cases money is appropriated in pursuance of proposals thus initiated, notwithstanding the fact that the heads of the services affected protest vigorously that they have no need for such money or for the services to be furnished by such funds.
>
> Under the British system responsibility is definitely located with an officer who can be, and is, held to a rigid account of the manner in which the funds asked for are expended. Under the American system the

enforcement of any effective system of securing responsibility and accountability is impossible.[1]

The Budget and Governmental Efficiency.—The budget is the determining element of the problem of securing governmental efficiency. A budget has been defined as "a collection of documents through which information regarding the condition of the Treasury and financial operations, past and prospective, are brought together, co-ordinated and compared in such a way that intelligent action can be had in the way of adopting a financial and work program for the future."[2] A satisfactory budget requires a uniform system of accounting and expenditure documents, and additional information regarding the financial operations of the government.

For the formulation of general policies, information regarding total expenditures according to a few grand divisions is required. On the other hand, to insure that money voted will be applied in an effective manner, and to maintain a proper supervision and control over actual expenditures, information regarding the details of expenditures by particular units, or for particular activities or objects, is needed. A budget, which is essentially an information document, should present both classes of information in the clearest manner possible.[3]

There are three main types of budgets, namely, an executive-made budget, a legislative-made budget, and a budget made by the two departments combined. Those who defend an executive-made budget contend that the legislature should not be permitted to initiate, or should refrain from initiating, measures for the expenditure of money.

The prime essentials in the preparation of a budget are unity and co-ordination, which, it is claimed, can be secured only through a single executive authority. Defects of the legislative-made budget, such as those of the United States and France, are pointed out by Doctor Willoughby.

[1] W. F. Willoughby, W. W. Willoughby, and S. M. Lindsay, *Financial Administration of Great Britain* (D. Appleton & Co., 1917), pp. 39–40.
[2] W. F. Willoughby, *The Problem of a National Budget*, pp. 9–10.
[3] *Ibid.*, pp. 25–26.

Extravagance, waste, and misapplication of public funds [he concludes] have invariably resulted where the legislative branch has been given the determining voice in the enactment of budgetary proposals. Of this, the United States and France furnish the leading illustrations. In both countries the extent to which appropriations are made for purposes not corresponding to national needs, and representing gross waste of the public funds, amounts to a national scandal. In this country millions of dollars are annually wasted in maintaining useless army posts, navy yards, and other local stations. Other millions are similarly wasted in the erection of public buildings and the execution of public works which are useless, or at least have no utility commensurate with the expenditures involved in their construction and subsequent maintenance. The direct money loss thus resulting is, moreover, but a part of the damage done. The location of the stations and plants at unsuitable points makes it impossible to secure an efficient administration of the services to which they belong. The result is to discourage economy on the part of those intrusted with the administration of these services to lower the whole tone of public administration. In France, conditions in normal times are scarcely, if any, better.[1]

In America the legislative-made budget has been the rule until quite recently, when a few states instituted the executive-made budget. When the legislature makes the budget, one of the difficult problems involved is the question whether the legislature should grant funds in lump sums or itemize its appropriations.

These difficulties are largely obviated in England and other European countries by making the executive responsible for the budget and by limiting the right of members of the legislature to initiate measures involving expenditures. "The secret of the whole matter thus lies in definitely locating power and responsibility over appropriations in that organ which represents the whole country and is directly responsible for the conduct of public affairs."

For a long time it was thought that an honest and capable administrative official could secure better results if he was given a free hand in the expenditure of public funds. But instances of dishonesty and misappropriation of funds proved so frequent that legislatures began to turn

[1] W. F. Willoughby, *The Problem of a National Budget*, pp. 40–41.

in the direction of specific appropriations, prescribing in detail the amounts of money to be spent and the purposes for which the expenditure should be made. In legislative-made budgets both the lump-sum plan and the specific appropriation method have serious defects which modern budget procedure aims to avoid. Some of these defects are obviated by means of what is known as the "transfer system," which renders it possible to appropriate minimum estimates, or slightly more, with the proviso that transfers may be made to those departments which find it necessary to approach maximum estimates. An effective check on extravagant expenditures can be provided under this plan by requiring a statement of reasons for requests for additional funds and instituting an investigation before the request is granted. Such a transfer system has been tried with marked success in the financial methods of some of the states.[1]

Another device which is employed in budget making, and which has been recommended for the Federal government, is the allotment system, whereby appropriations are made under a relatively few heads corresponding to the main divisions of government, and the departments and bureaus then proceed to make an allotment of these lump sums to specific subdivisions of the services to which they relate, each subdivision making a further allotment; and in all cases distribution is indicated in writing, and changes are not permitted without the approval of a supervisory or controlling authority. An allotment system such as that outlined above has been recently adopted in the budget act of the state of Minnesota.

At the present time Congress and most of the state legislatures specify in detail the manner in which the money appropriated for various purposes shall be spent. This arrangement fails to give flexibility, and either results in the waste of funds or entails deficiency appropriations to make up the amounts needed by certain departments.

[1] *Cf.* W. F. Willoughby, *The Problem of a National Budget*, pp. 46–47.

Thus, "the services have no incentive to economize in the expenditure of the funds appropriated, since all surpluses so realized, instead of being available for use by the services effecting the economy by their transfer to other heads, must be covered back into the general treasury."[1]

The essential principles of budget making, then, are responsibility, accountability, and control. It is clear that the end to be sought in providing for the finances of a nation are economy and efficiency in the work which the government undertakes. To this end the misapplication and waste of funds must be prevented. Such misapplication and waste may arise from expenditures for public works of relatively little value, or from fraud and carelessness on the part of those in whose custody public money is placed, or from exorbitant or unreasonable demands by heads of departments, bureaus, or commissions.[2] In order to meet these difficulties it is necessary to provide "means by which a rigid supervision, control, and accounting may be exercised at every step from the first estimating of the needs of the several services to the final expenditure of the sums voted."[3] This control must be exercised first by the heads of the different bureaus or divisions, whose duty it is to review carefully the requests of subordinates and to approve only those which are necessary for economical and efficient management. In addition control may be exercised through supervision by the heads of the departments under which the bureaus and divisions belong, and through revision and review by the central executive. Finally, control is exercised through criticism and condemnation by legislative bodies and through public opinion.

The extent and nature of the supervision and control exercised in the expenditure of public funds vary in accordance with the method of exercising such supervision and control. In the United States this control is largely in the hands of the legislature, which makes appropriations

[1] W. F. Willoughby, *The Problem of a National Budget*, p. 54.
[2] *Cf. Financial Administration of Great Britain*, pp. 10–12. [3] *Ibid.*, p. 12.

in detail in such a way as to leave as little discretion as possible with spending officers. Departments or divisions are regarded as independent and co-ordinate units working under the authority of the legislature. In England the primary power of control is in the Treasury Department, a branch of the administrative service. Moreover, while it is the practice in the United States to grant appropriations in detail for all of the work of a department,

> the appropriation system of the British government rests upon the contrary principle, that of having the appropriation funds binding only as regards certain large heads, and of permitting the exercise of a wide discretion on the part of the executive in respect to the employment of the funds under these general heads.[1]

Growing out of the unsatisfactory methods of appropriating public money and intimately connected therewith is the problem of administrative reorganization in the Federal government. Despite the handicaps under which executive departments have labored owing to Congressional domination, the departments of the Federal government have attained a degree of efficiency which offers a marked contrast to the inefficient and wasteful practices of state, city, and county governments. Nevertheless, the Federal departments, largely on account of the restrictions and limitations involved in the exercise of the financial powers of Congress and the loose methods of control over expenditure, have been severely criticized, and continuous efforts have been made to secure improvement of administrative organization and methods. Under the title "Confusion Worse Confounded" the chairman of the House Appropriations Committee has recently condemned the administrative methods of the Federal government in the following statement:

> To-day duplication in the government service abounds on every hand. For example, eight different departments of the government, with large overhead organizations, are engaged in engineering work,

[1] *Financial Administration of Great Britain*, p. 19.

in navigation, irrigation, and drainage; eleven different bureaus are engaged in engineering research; twelve different organizations are engaged in road construction; while twelve, with large overhead organizations, are engaged in hydraulic construction, and sixteen are engaged in surveying and mapping. Sixteen different bureaus exercise jurisdiction over water-power development; nine different organizations are collecting information on the consumption of coal; forty-two different organizations, with overhead expenses, are dealing with the question of public health. The Treasury Department, the War Department, the Interior Department and the Department of Labor each has a bureau dealing with the question of general education. These departments operate independently; instances of co-operation between them are exceptional. Each of these departments is manned at all times with an organization prepared to carry the peak of the load, and maintains an expensive ready-to-serve personnel. A lack of co-operation in the executive departments necessarily leads to gross extravagance.[1]

Administrative Reorganization in the United States.[2]—The problem of administrative organization has been under consideration by several general committees and by separate investigating committees for different departments. Two of the general committees—namely, the Keep Commission and the President's Commission on Efficiency and Economy, are worthy of brief review.

The Keep Commission, known as the Committee on Departmental Methods, was appointed by President Roosevelt.[3] It was made the duty of the commission to ascertain "in what respects our present government methods fall short of the best business standards of to-day" and to recommend measures of reform.[4] The commission appointed subcommittees to investigate administrative practices and to describe existing conditions. It was found that the classification of positions and salaries was based upon acts of Congress passed more than fifty years before, and that "most startling anomalies and inequities existed." Some of the recommendations of the Commission were

[1] J. W. Good, *The Saturday Evening Post*, vol. cxcii, no. xxxvii.
[2] *Cf.*, part iii, pp. 323–339, for administrative reorganization in the states.
[3] The members of the committee were Charles A. Keep, Frank H. Hitchcock, Lawrence O. Murry, James R. Garfield, and Gifford Pinchot.
[4] H. J. Ford, *The Cost of the National Government*, pp. 98–99.

put into operation by executive order when no legislative action was necessary. A complete reclassification of the service, with corresponding readjustments of salaries, was suggested. But Congress not only failed to enact the necessary legislation, but also included in the appropriation bill for the executive departments a proviso intended to prohibit further action of this kind by the executive department.[1]

It seems to have been taken for granted that it was not the duty of the executive to prepare a budget, although powers accorded him by the Constitution amply warrant his assuming this function. Not until March 4, 1909, was any definite action taken looking toward the exercise of budgetary powers by the President. Congress then inserted a clause in a civil appropriation act requesting the President to suggest measures to reduce the estimates submitted by the Secretary of the Treasury when such estimates exceeded available revenues, or to recommend new taxes to cover the probable deficiency.[2] Though no action was taken under this clause, the President on his own initiative began the consideration of estimates before their submission to Congress.[3] These measures seem merely to have brought to public attention the defects in the method of preparing estimates and to have led to further efforts to secure definite action looking to the establishment of a budget system. The repeated recommendations of the Secretary of the Treasury were followed by the request of the President for an appropriation to secure

> . . . the employment of accountants and experts from official and private life to more effectively inquire into the methods of transacting the public business of the government in the several executive departments and other government establishments, with the view of inaugurating new or changing old methods of transacting such public business so as to attain greater efficiency and economy therein.[4]

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[1] C. H. Forbes-Lindsay, "The Work of the Keep Commission," *Review of Reviews*, February, 1908.

[2] 35 Stat., 1027, sec. 7.

[3] W. F. Willoughby, *The Problems of a National Budget*, pp. 137–138.

[4] 36 Stat., 703.

In pursuance of the appropriation granted for this purpose the President's Commission on Economy and Efficiency was established. This commission, under the direction of Dr. Frederick A. Cleveland, made a survey of the various agencies of the Federal administration and submitted suggestions for reform.[1] As a basis for constructive recommendations a study was made particularly of administrative organization as embodied in the budget and financial machinery of the leading foreign countries. President Taft, in submitting to Congress the report of the commission, observed that little attention had been given to

> . . . the working out of an adequate and systematic plan for considering expenditures and estimates for appropriations; for regularly stating these in such form that they may be considered in relation to questions of public policy; and for presenting to Congress for their consideration each year, when requests are made for funds, any definite plan or proposal for which the administration may be held responsible.[2]

Despite the work of the regular committees on expenditure in Congress and more than one hundred special investigating committees authorized to secure information on expenditures, the President concluded:

> No regular or systematic means has been provided for the consideration of the detail and concrete problems of the government.
>
> A well-defined business or work program for the government has not been evolved.
>
> The reports of expenditures required by law are unsystematic, lack uniformity of classification, and are incapable of being summarized so as to give to the Congress, to the President, or to the people a picture of what has been done, and of cost in terms either of economy of purchase or efficiency of organization in obtaining results. . . . So long as the method at present prescribed obtains, neither the Congress nor the country can have laid before it a definite understandable program of business, or of governmental work to be financed; nor can it have a well-defined, clearly expressed financial program to be followed; nor

[1] The other members of the commission were Frank J. Goodnow, professor of public law; W. W. Warwick, accounting officer of the Panama Canal Commission; Harvey S. Chase, certified accountant; and Merritt O. Chance, auditor for the post office.

[2] From the Message of the President, printed in House Document No. 854, Sixty-second Congress, Second Session, p. 2.

can either the Congress or the Executive get before the country the proposals of each in such manner as to locate responsibility for plans submitted or for results.[1]

After making an exhaustive study of the administrative organization of the Federal government and an analysis of the budgetary methods of the leading foreign governments, the commission presented recommendations to the President and Congress to the effect that the President should prepare the budget and that it should be comprised of a budgetary message, a financial statement, a summary of expenditures and estimates, with the necessary changes in law to put the budget into effect.

The commission was discontinued in June, 1913, because of the failure of Congress to appropriate the necessary funds for its support. And the recommendations of the commission, although they received the cordial support of the President,[2] were ignored by Congress. Nevertheless, despite the unwillingness of Congress to accept the principle of the executive budget, the chairman of the House Committee on Appropriations has repeatedly urged in that chamber the establishment of a single committee on appropriations.[3] Public discussion favorable to the enactment of a budget law led to the presentation in Congress of resolutions urging such enactment beginning with the session of 1917. But it was not until the session of 1919 that the budget was regarded of sufficient importance to receive much consideration. In this session two bills—namely, the Good bill and the McCormick bill—resulted in a prolonged discussion and the passing of a budget bill which was vetoed by the President.

The bill vetoed by President Wilson has been introduced in the special session of Congress in April, 1921, and

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[1] From the Message of the President, printed in House Document No. 854, Sixty-second Congress, Second Session, pp. 2 and 4.

[2] See especially House Document No. 851, Sixty-second Congress, Second Session, 1912; Senate Document No. 1113, Sixty-second Congress, Third Session, 1913.

[3] W. F. Willoughby, *The Problem of a National Budget*, pp. 146 ff.

it is understood that, with some minor changes, will be enacted into law.

The bill provides that the President annually shall submit to Congress an estimate of expenditures and an estimate of receipts. Where income is excessive, or insufficient, he is directed to recommend changes in the laws to bring about a balance. He is also required to submit statements of the condition of the Treasury, the indebtedness of the government, and other financial aid.

A "Bureau of the Budget" is set up in the Treasury Department, under a director. His duty will be to collect from the various executive branches information as to their requirements. This bureau also is directed from time to time to make detailed studies of the departments, with the idea of determining changes which would bring economy and efficiency. The bureau also is to aid committees of Congress, and is given power to examine records.

The bill establishes a "general accounting office," under a "Comptroller General of the United States." He will replace the existing Comptrollers of the Treasury, and six auditing officers, and perform their duties in the examination of government accounts. His office, in brief, will be the central bookkeeping office of the government, and will be independent of the executive establishment. He is directed to make reports and recommendations to Congress.

There is a proviso that no estimate or request for an appropriation and no request for an increase in any item shall be submitted to Congress or any committee thereof by any officer or employee of any department or establishment, unless at the request of either House of Congress.

Though the enactment of this bill would result, no doubt, in considerable improvement in the methods of submitting estimates to Congress with pertinent information, and in the preparation of financial reports by department and bureau chiefs, it falls far short of the adoption of the necessary principles of a satisfactory budget system. The individual members of Congress are presumably free to

draw on the public treasury through special bills carrying appropriations, and thus the pernicious practices of log-rolling and the pork-barrel will be likely to continue. Moreover, this bill makes no provision for executive visé and control of expenditures after the passage of appropriation bills. The effective method of adjusting expenditures to meet changing conditions and of checking expenditures at all times—the functions performed by the Treasury in England—remains as yet to be provided. A beginning has merely been made toward the establishment of an effective budget system in the Federal government.

Expenditures in the states are on the increase and the budgets of city and county governments have grown rapidly, making a huge total expenditure each year for all governmental purposes. The upward trend is illustrated by the following table:

TOTAL GOVERNMENTAL COST PAYMENTS, WITH PER CENT OF INCREASE, 1913 AND 1903.[1]

Division of Government	Total Governmental Cost Payments.		
	1913	1903	Per cent of Increase.
Total	$3,284,343,266	$1,773,186,446	85.2
Federal	952,600,857	616,739,361	54.5
States	382,551,199	185,764,202	105.9
Counties	385,181,760	197,365,827	95.2
Incorporated places of 8,000 and over	1,119,843,682	551,234,172	103.2
All other civil divisions (estimated)	444,165,768[2]	222,082,884	100.0

Budget Reform in State Governments

The unsatisfactory arrangements for financing the Federal government are duplicated in the financial systems of the states. Conditions applicable to state government have been summarized by Professor Holcombe:

[1] From address of chief statistician of Census Bureau, delivered before the National Tax Association at San Francisco, August 12, 1915.

[2] Includes $126,792,995 actual governmental cost payments of incorporated places of 2,500 to 8,000 population.

Each department of administration ordinarily reports directly to the legislature upon the expenditure of its appropriations, and transmits in the same manner its estimates of the appropriations necessary and proper for the ensuing year, or, in the case of states, where the legislature meets biennially, two years. Ordinarily neither the Governor nor any other executive officer has anything to do with any departmental estimates save his own. . . .

The legislatures refer the departmental reports and estimates to standing committees. The practice differs in different states. In some there are several committees with jurisdiction over different classes of appropriations. In others all appropriation bills must be referred to a single committee. In some states there are separate appropriations committees in each house. In others there is a single joint committee. In some states bills that carry appropriations, not required to cover departmental estimates, may be reported by various committees, without consultation either with the departments concerned or with the appropriation committee. In most states such bills must be referred before final action by the house to the appropriation committee. Thus there is some centralized control over the appropriation bills in most legislatures. But the department heads must appear before the appropriation committee and demonstrate the necessity and propriety of the appropriations for which they have asked. They appear independently, each working solely for his own department, and responsible in no way for other departments or for the size of the state appropriations as a whole. Since every active department head normally wants to expand the services of his own department and is likely to overrate its importance as compared with others, departmental estimates tend to increase year by year, without much regard to the general growth of public expenditures and revenues. Thus the legislature is confronted with the difficult task of reducing the estimates in order to keep the total appropriations within reasonable compass. This task is made more difficult by the number and magnitude of special and local appropriations which many districts want their representatives to procure for them in addition to the appropriations for regular departmental work. This system inevitably breeds extravagance and inefficiency. The departmental reports ordinarily present no clear picture of the fiscal operations of the state as a whole, the estimates of the various department heads are likely to be excessive, and their recommendations unrelated to one another or to any coordinated administrative policy. The officer, if any, who collects the estimates and transmits them to the legislature has no control over them, the department heads themselves have no constitutional right to defend their estimates, and in practice the legislature may disregard them. The result tends to be perfunctory work on the part of the

state fiscal officers. Intelligent planning for the future by the administration is almost impossible. Even the balance of current appropriations and revenues is made difficult.[1]

Progress of State Budget Reform.—The movement for budget reform to remedy existing conditions was begun about 1911, when the first step was taken by the state of Wisconsin. Since this time the majority of the states have provided for some form of budget system. Among the states which have adopted recently an improved budget procedure are: Connecticut, 1915; Illinois, 1913; Iowa, 1915; Kansas, 1917; Louisiana, 1916; Maine, 1915; Maryland, 1916; Minnesota, 1915; Nebraska, 1915; New Jersey, 1916; New Mexico, 1917; New York, 1916; North Dakota, 1915; North Carolina, 1917; Ohio, 1913; Oregon, 1913; South Dakota, 1917; Tennessee, 1917; Utah, 1917; Vermont, 1915; Washington, 1915; Wisconsin, 1911.

The extension of the new ideas in budget making is apparent in the legislative sessions of 1918 and 1919.[2]

Though various plans for the handling of finances have been tried in the states there are three main forms of budgetary practice. The first and most common form is the legislative budget. In this form the entire responsibility for the preparation of the budget rests upon the legislature. The legislature may delegate its authority to one committee or to several committees. It may request aid from the executive departments and all subdivisions thereof. It may hold public hearings or not, according to the discretion of the committees. It may increase or decrease freely the requests of officers and departments. It may as it pleases vote appropriations by separate bills or combine them into one bill. The legislative budget has been the dominant form in the American states. Other types of budgets, such as the executive budget and the commission budget, have in the last decade brought about

[1] A. N. Holcombe, *State Government in the United States* (The Macmillan Company, 1916), pp. 332 ff.

[2] Consult session laws of Arizona, Colorado, Idaho, Indiana, Kentucky, Maine, Massachusetts, Nevada, South Dakota, Texas, and Wyoming.

some significant changes in the financial procedure of many states. Where the executive budget obtains the Governor, or some board responsible to him, is given full authority in preparing the budget and seeing it through the legislature, and where this system is installed in an effective form the legislature is prohibited from increasing items in the budget submitted by the Governor, and members may not introduce bills involving the expenditure of money without making provision to secure the necessary funds. The commission, or board, form of budget is best illustrated by the arrangement in Wisconsin, whereby an effort has been made to limit the financial powers both of the legislature and of the Governor. In 1911 a board of public affairs was created, consisting of the Governor as chairman, the Secretary of State, the President *pro tem.* of the Senate, the Speaker of the House, the chairmen of the Senate and House committees on finance, and three additional members appointed by the Governor. Soon after its establishment this board was authorized to prepare a budget for submission to the Legislature. In order to perform its functions effectively the board is authorized to devise a uniform system of accounting and formulate plans for the improvement of administration.

It is the executive budget, however, which has come to replace or to modify greatly the older type of legislative committee system. The real executive budget system, under which the legislature cannot increase the Governor's budget, has been accepted in only a few states. Maryland and New Mexico provide that the legislature may only reduce or strike out items, and may enact supplementary measures for purposes not provided for in such budget, only by following the special procedure indicated. The budget amendment submitted by the New York Constitutional Convention of 1915 contained a similar provision, as does the constitutional amendment adopted in 1918 in West Virginia.

The adoption of this limitation upon the power of the

legislature to make appropriations in excess of the sums recommended in the budget is a step of great importance. In Great Britain it has long been the rule that Parliament shall make no appropriation which the Ministry has not included in the budget.

Maryland was the first state to provide by constitutional amendment for a definite type of executive budget. The details of the Maryland plan are as follows:

Executive Budget Established by Constitutional Amendment in Maryland.[1]—A large deficit due to the reckless action of the legislature aroused the people of Maryland, in 1915, to the need of an effective budget system. As a result of the public agitation of this issue, the Democratic state convention appointed a citizen commission, with Dr. Frank J. Goodnow (former member of the President's Commission on Economy and Efficiency) as chairman, to prepare a report containing specific recommendations. The Goodnow Commission rendered a report proposing a constitutional amendment to establish an executive budget system, which amendment was approved by the legislature and ratified by the voters in November, 1916.

The provisions of the amendment are as follows: The Governor shall require from the officers of all executive departments and administrative offices, bureaus, boards, commissions, and institutions expending public money, itemized estimates and other information necessary to the preparation of a budget. The Governor may provide for public hearings on the estimates, may require the attendance of representatives of all agencies and institutions, and may revise at his discretion the estimates presented. The estimates for the legislative and the judicial departments and for the public schools are not subject to revision by the Governor.

Upon the convening of the General Assembly, the Governor shall submit two budgets, one for each of the two

[1] Condensed from "The Recent Movement for State Budget Reform, 1911–1917," *Municipal Research Bulletin*, no. xci, pp. 43 ff.

succeeding fiscal years, and a bill for all proposed appropriations, clearly itemized and classified. Accompanying each budget shall be a statement showing:

Revenues and expenditures for each of the two preceding fiscal years;
Current assets, liabilities, reserves, and surplus or deficit of the state;
Debts and funds of the state;
Estimates of the state's financial condition as of the beginning and the end of each ensuing fiscal year; and
Any explanation which the Governor may desire to make as to important features of any budget, and any suggestion as to methods for the reduction or increase of the state's revenues.

Before final action upon the budget by the General Assembly, the Governor may amend or supplement it to correct an oversight, or, in case of emergency, with the consent of the general assembly, may deliver such amendment or supplement to the presiding officers of both houses.

In its action upon the budget bill the General Assembly may not amend it so as to affect the guaranties of the constitution or statutes for the establishment and maintenance of a system of public schools or constitutional provisions as to salaries; it may, however, increase or diminish items relating to the legislature or the judiciary. In no other particular may it alter the bill except to strike out or reduce items, providing no salary of any public officer is reduced during his term of office.

The Governor and representatives of the departments of the executive branch of the government designated by him shall have the right, and when requested by either house it shall be their duty, to appear and be heard and answer questions relating to any item of the budget bill under consideration. Until after final action upon the budget bill neither house shall consider any other appropriation measure. Other appropriations must be embodied in separate bills, each limited to a single purpose and containing provision for revenue necessary for that purpose. Such bills may be passed only by a majority vote of the whole number of members elected in each house, and, when passed, shall

be subject to the Governor's approval or veto. The Governor by proclamation may extend the session in case of failure of the General Assembly to take final action upon the budget bill three days before the expiration of the regular session; and during such extended period no other matter than such bill shall be considered except provision for the cost of the session.

The Executive Budget in Other States.—The executive budget was also adopted in Illinois as a result of preliminary action by the legislature in 1913 and the enactment of the civil administrative code in 1917. Under the code a department of finance is established whose duty it is to prescribe and install a uniform system of bookkeeping, accounting, and reporting for the several departments; to supervise and examine the accounts and expenditures of the departments; to prepare and report to the Governor estimates of taxes and revenues; and, biennially, to prepare a state budget. Since the head of the department of finance is appointed by the Governor and is responsible to him, a centralized supervision and control is established for all of the officers and agencies provided in the civil administrative code. The constitutional officers and departments are not affected by this centralized control, and the legislature may increase items as recommended by the Governor, with the result that Illinois has adopted only partial arrangements for an executive budget.

The legislature of Utah passed a budget act which embodies the essential features of the Maryland plan.[1] It provides that the Governor shall prepare and submit to the legislature a budget containing "a complete plan of proposed expenditures and estimated revenues for the ensuing biennium." This budget shall not be altered by the legislature "except to strike out or reduce items," nor will the legislature consider any other appropriation

. . . except an emergency appropriation for the immediate expense of the state legislature, until the budget has been finally acted upon by

[1] Acts of 1917, chap. xv.

both houses. Every appropriation in addition to that provided for in the budget shall be embodied in a separate act and shall be limited to some single work, object, or purpose therein stated. No supplementary appropriation shall be valid if it exceeds the amount in the state treasury available for such appropriation, unless the legislature making such appropriation shall provide the necessary revenue to pay such appropriation by a tax, direct or indirect, to be laid and collected as shall be directed by the state legislature; provided, that such tax shall not exceed the rates permitted under the constitution of Utah. This provision shall not apply to appropriations to suppress insurrections, defend the state, or assist in defending the United States in time of war.[1]

New Mexico enacted a similar type of executive budget, with the proviso that the Governor and heads of departments, institutions, and agencies of the state shall have the right to appear and be heard by the legislature.

In Delaware, Ohio, Virginia, and New Jersey the executive prepares the budget, but the legislatures of these states retain the right to change freely all budgetary proposals. The same is true of Massachusetts, which places the responsibility for the preparation of the budget upon a supervisor in conjunction with the Governor, but accords to the legislature the power to "increase, add, decrease, or omit items."

To summarize the results accomplished in budget legislation more than half of the states have adopted the principle of a consolidated statement of estimates;[2] all but a few of these provide for a general review of the budget as a whole, with recommendations for unity and co-ordination and for economical and efficient administration; the final formulation of the budget has been taken from legislative committees and has been placed in a joint legislative and administrative committee, in an administrative board,[3] or in the Governor. Among the states which have placed the responsibility for the formation of the budget upon the

[1] Acts of 1917, chap. lxxxi.

[2] W. F. Willoughby, *The Movement for Budgetary Reform in the States* (D. Appleton & Co., 1918), p. 175.

[3] *Ibid.*, pp. 179 ff.

Governor are Delaware, Illinois, Iowa, Kansas, Maryland, Minnesota, Nebraska, New Jersey, New Mexico, Ohio, Oklahoma, and Utah.

It is apparent that a satisfactory budget plan requires a centralized administrative system. A few states have recognized the close relation of the budget to administrative reorganization, and have grouped the state services under a few department heads who are appointed by the Governor and are under his direct supervision and control.

Although encouraging progress has been made in the matter of budgetary legislation, much remains to be accomplished. The chief objectionable feature of the present budget system in all but a few states is that the department estimates are compiled and sent to the Legislature without being reviewed by an administrative officer who is acquainted with the entire business of the state, whose duty it is to compare one claim with another and to cut when necessary, and, finally, to adjust the expenditures to the estimated revenues. Another objection is that each member of the legislature may introduce bills, carrying charges upon the state treasury, with the result that when the legislature adjourns no one knows how much money has been appropriated.

The problem of the preparation and adoption of the state budget involves, then, the following essentials:

1. An executive who is responsible to the people for leadership in making, submitting, and explaining a finance program for the government.

2. A representative body whose duty it is to review critically the entire budget and to withhold its approval of the budget until it is amended by the removal of features objectionable to the majority of the body.

3. A provision for an appointment with the executive permitting him to meet with the representative body and to present and explain his budget, so that opportunity may be given for more intelligent discussion.

4. Provision whereby any important issue may be settled by a prescribed method of adjustment imposed upon the executive and a majority

of the representatives of the people, or, in case this is not possible, by a referendum to the people at an election to determine which of the partisans to the controversy shall be retained in the public service, the essential purpose of such referendum being to make the government responsive to the will of the majority, and to put the administration into the hands of persons who are in sympathy with the policy adopted.[1]

Budget Making in Cities

The grave defects in government financial methods first became evident in the management of cities, and it was in this branch of government that improved methods were first considered and adopted. In the old type of city charter the budget-making authority was vested in the council, and the annual appropriation bill frequently represented the result of systematic log-rolling by the members of the council and of the pressure of large interests demanding government favors. This condition was aptly described by the Boston Finance Commission when it said of the city council of that city:

> Its work on the annual appropriation bill consists generally of attempting to raise the mayor's estimates to the maximum amount allowed by law, with preference for those departments where the patronage is largest. Loan bills are log-rolled through with more regard for the demands of interested constituents and the possibility of jobs than for the needs of the city as a whole.

Under this system measures of public policy were often ignored by councilmen in their efforts to secure from the city funds "jobs" for their constituents. No councilman was responsible, and the organizations supporting particular measures could not secure a hearing or a fair discussion of the merits of their demands.[2]

When the weaknesses of the above described methods of municipal finance became notorious a campaign of education was begun which resulted in the introduction of re-

[1] W. F. Willoughby, *The Movement for Budgetary Reform in the States* (D. Appleton & Co., 1918), pp. 179 ff.

[2] *Cf.* C. A. Beard, *American City Government* (The Century Company, 1912), p. 144.

forms in budget-making, in accounting, and in the purchase of supplies. These reforms took definite shape in the provisions of new city charters, especially in the commission plan of city government. The utter ignorance which prevailed regarding public finance led the New York Bureau of Municipal Research to inaugurate a budget exhibit, the purpose of which was to present in graphic form the past and proposed expenditures of the city. The exhibit comprised charts, diagrams, photographs, and other methods of representation that appropriately illustrated budget requests and the relation of the same to other expenditures and to the general growth and progress of the city. The exhibit proved to be so successful that it was repeated in New York City, and has been imitated in other cities desiring to bring about greater publicity in the preparation of the financial program of the government. The publicity given to methods of municipal finance by the New York Bureau of Municipal Research and other organized agencies led to the adoption by many cities of a revised budget procedure.

The reformed budget procedure of New York City requires:

1. The submission by heads of departments, bureaus, boards, etc., of estimates to the Board of Aldermen, and the printing of the estimates in the *City Record*.

2. The preparation by the Board of Estimate and Apportionment of a *tentative budget* for the purpose of public discussion.

3. The adoption by the Board of Estimate and Apportionment of a *proposed budget*, items of which may thereafter be decreased, but not increased.

4. The holding of public hearings on the budget before final adoption by the board.

5. Submission of the budget to the Board of Aldermen at a special called meeting.

"The Aldermen may reduce or eliminate any item in the tax budget (except those fixed by law, those covering state taxes, or those providing for interest or repayments on the city debt), but they cannot increase any appropriation, or insert any new item, or change the conditions under which appropriations are to be spent. Even where they reduce

or strike out any item their action is subject to veto by the Mayor, and this veto can only be over-ridden by a three-fourths vote."[1]

A further advance in budget-making in cities was the introduction of the allotment plan in the new budgets of Detroit and Philadelphia. Under this plan the head of each department or division was given a sum of money to be spent in the manner which would secure the best results. A uniform classification of accounts was introduced, and transfers between departments were largely eliminated. Many other cities have taken partial steps to introduce a more satisfactory budget procedure and to interest the citizens in the intricate problems of municipal finance.[2]

The plan of an executive budget for municipalities has been gaining adherents, just as have the similar plans for the Federal government and the states. Expressing in concrete form the proposals of tax commissions and chambers of commerce, the idea has been incorporated into the model city charter adopted by the National Municipal League.

Sec. 51. Annual Budget. Not later than one month before the end of each fiscal year the City-manager shall prepare and submit to the council an annual budget for the ensuing fiscal year, based upon detailed estimates furnished by the several departments and other divisions of the city government, according to a classification as nearly uniform as possible. The budget shall present the following information:

(a) An itemized statement of the appropriations recommended by the city-manager for current expenses and for permanent improvements for each department and each division thereof for the ensuing fiscal year, with comparative statements in parallel columns of the appropriations and expenditures for the current and next preceding fiscal year, and the increases or decreases in the appropriations recommended;

(b) An itemized statement of the taxes required and of the estimated revenues of the city from all other sources for the ensuing fiscal year,

[1] W. B. Munro, *The Government of American Cities* (Third Edition), (The Macmillan Company, 1920), pp. 408–409.

[2] For an account of what is being done in representative cities, see "Recent Progress in Budget-making and Accounting," by C. E. Rightor, *National Municipal Review*, vol. vi, p. 707.

with comparative statements in parallel columns of the taxes and other revenues for the current and next preceding fiscal year, and of the increases or decreases estimated or proposed;

(c) A statement of the financial condition of the city; and

(d) Such other information as may be required by the council.

Copies of the budget shall be printed and available for distribution not later than two weeks after its submission to the Council; and a public hearing shall be given thereon by the Council or a committee thereof before action by the council.[1]

It will be noted that responsibility for the preparation of the municipal budget is thus placed upon the city manager, but the plan falls short of a real executive budget in that no restrictions are placed upon the council in passing upon the items of the budget.

While the number of cities with city-manager charters is small, most of these cities and a considerable number of commission-governed cities have adopted concentration of responsibility in the preparation of the budget, public hearings to stimulate interest, and better accounting and auditing practices.

With the ever-increasing expenditures made by the national and state and local governments for necessary purposes and with the haphazard methods of making appropriations by these bodies has come the accumulation of debts by local, state, and national governments.

Extraordinary Growth of Public Debts

In many respects the greatest problem of government finance is involved in the tremendous increase in public debts. The borrowing of money has been regarded as unwise except for the meeting of emergencies, such as war, or for the payment of improvements in which the future generations may profit and for which they should aid in paying. Far the larger part of the indebtedness of the United States has been the result of wars and war prepara-

[1] *A New Municipal Program*, edited by C. R. Woodruff (D. Appleton & Co., 1919), pp. 347–348.

tion. The amount of indebtedness of the states is relatively small and, in view of their resources and liabilities, is not a serious item. By means of bond issues a great increase of indebtedness has occurred in city and local divisions. Local governments have frequently undertaken public improvements that should have been paid for through taxation.

The recent growth of public debts in the United States may be illustrated by the following data:

	1902	1913	Per Cent Increase.
States	$261,000,000	$400,000,000	54
Cities	1,040,000,000	2,040,000,000	100
Counties	200,000,000	372,000,000	186
District debts	400,000,000	.....	.....

According to Professor Plehn, "It is safe to assert that public indebtedness, state, county, district, and municipal, has increased more than 100 per cent in the last decade."[1] And in view of the extraordinary increase of public debts along all lines the same authority concludes: "It would seem that much more caution should be exercised in debt making. A little slower pace in acquiring public facilities, a higher tax rate for a few years, will save money and thus make a faster growth in the long run possible." These words of warning were given before the United States entered the war and before the recent enormous public burdens were assumed, which will require a new calculation as to all public debts. The public debt of the United States was increased from 1,208 millions on March 31, 1917, with a per capita debt of $11.33 to a debt of 26,597 millions on August 31, 1919, with a per capita debt of $249.38.

The difficulty and dangers of public borrowing are well illustrated in the experience of the city of Grand Forks, North Dakota, as told by the State Tax Association.

[1] C. C. Plehn, *Government Finance in the United States* (Chicago, 1915), p. 110.

Fire engine cost	$6,000.00
Interest, 35 years:	
(1) On $6,000 @ 7% for 15 years	6,300.00
(2) On $5,000 refunding bonds @ 6% for 20 years	6,000.00
Total cost	$18,300.00

The engine had been cast on the junk heap for ten years when the report was made, and there was still due on the engine $5,000.

Speaking of the debt of New York City in 1909, Dr. Frederick A. Cleveland raised a query as to the waste and extravagance involved in large public debts. The city, he said,

> . . . pays $30,000,000 per annum interest on debt and $20,000,000 for redemptions. When we consider its real-estate purchases, its construction contracts, its methods of using corporate stock to cover up transactions that are not reported in budget estimates, is it too much to say that one half of the debt of the city represents the tribute of the poor to grafters and to those who profit from the city's inefficiency? [1]

But paying principal and interest of debts which involve a certain percentage of waste, graft, and inefficient business management is not confined to the smaller units of government. The President's Commission on Economy and Efficiency reported in 1913 that in the conduct of the government on a peace basis large expenditures were made for which there was no adequate return. For example, it was found in an investigation of the adjutant-general's office

> . . . that the methods of handling a large part of the correspondence of that office are antiquated and extremely complicated, and they estimate under simpler and more modern methods a saving of over $3,000,000, or over 38 per cent, of its appropriation for employees' salaries can be ultimately saved to the government.[2]

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[1] *Municipal Administration and Accounting* (Longmans, Green & Co., 1909), p. 29.

[2] "Message of the President of the United States transmitting the reports of the Commission on Economy and Efficiency," House Document No. 1252, Sixty-second Congress, Third Session, January 8, 1913, p. 7.

Furthermore, it was suggested that the use of window envelopes in the government service would save at least $250,000, and other economies amounting to millions of dollars were pointed out by the commission. If waste and inefficiency are as great as reported by this commission in time of peace, it is natural to expect greater waste and inefficiency in war time. Some of the reports and investigations already completed show that in the huge expenditures of 1917 to 1920 large sums were spent for which the government secured no return. It may be that government in a democracy involves necessarily a high percentage of loss in money and efficiency, and it may be that war requires enormous outlays often with little or no satisfactory return. If this be so, should not those who create public debts exercise more caution, especially when the payment of the debt is likely to be passed on to a generation receiving no benefits therefrom? And it may well be asked by the citizen whether better checks cannot be placed upon wasteful methods both in times of war and in times of peace.

To what extent is public borrowing justifiable? What proportion and what character of government operations should be met by taxation? Should the cost of war be met by bonds or by taxation? These are questions which as yet remain far from being satisfactorily answered. Few, if any, satisfactory principles have been developed and practiced by other nations. Much more attention must necessarily be given to the consideration of these and other important problems involved in the colossal public debts which are being created.

Certain rules have been formulated that, if practiced, would obviate most of the difficulties of public borrowing. Jefferson formulated the rules: first, that bonds should not run beyond the life of one generation; second, that public funds should be raised by loans only for improvements or enterprises of undoubted permanence; third, that there should be no resort to borrowing if by any possibility the

proposed expenses may be met by taxes. That these rules have not infrequently been ignored is evident in the extraordinary growth of public borrowing.

Causes for Increase in Government Expenditures

It is obvious, then, that government expenditures for national, state, and local purposes have increased enormously during the past quarter of a century. Expenditures for war purposes have reached totals which make former outlays of money seem insignificant. The problems of appropriating and spending public money are becoming increasingly important, although equally difficult and baffling. The difficulties, however, do not appear unsurmountable, for some progress has been made in improving the methods of public business. The chief object in public business, as in private business, is not to cease spending money or necessarily to reduce expenditures, but more urgent is it that value is received for every cent that is spent. It was once the popular belief that government officials were prone to be dishonest and to profit by acts of collusion. "Turn the grafters out" was the slogan of those out of office in order that they in turn might have an opportunity to plunder the public treasury. But the truth is that the average public official sets about doing things honestly and to the best of his ability, that serious obstacles are found in the way of an upright public official, and that incentives and encouragement are mainly in the direction of wastefulness, extravagance, and collusive conduct, in which, however, the officeholder is frequently assured a share of the spoils. And the matter of chief concern is lessening the present wastefulness and extravagance and placing the public treasury beyond the temptations of local interests of unscrupulous officials.

Cost of Democratic Government.—The chief problem of government finance is conceded to be the wise expenditure of the public funds in such a manner "that they promote

in the highest degree the general welfare of all."[1] The advantages of civilized life are now in large part acquired by common effort. Common effort may be organized and rendered effective through voluntary private associations or through political organizations. The tendency of human development has been to extend common effort through political organization; as a consequence, with the development of civilized society the cost of these common efforts has increased, and this increment of cost has had to be met by additional taxation. The increasing cost of government is the outstanding tendency of modern times. Milton is reported to have indicated a preference for democratic government because it was less expensive than royalty, while the facts seem to show that the growth of democratic government has augmented the cost of the maintenance of public institutions. With the growth of representative assemblies, with the extension of the elective franchise, with the introduction of the direct primary, with the adoption of the initiative, referendum, and recall—in fact, with every step in making government responsible and responsive to public opinion, the cost of government has increased. The maintenance of popular institutions is an expensive business. The growth of expenditures may be illustrated by the fact that for the Federal government

Per-capita expenditure in 1810 was.....	$1.17
Per-capita expenditure in 1911 was.....	10.48
Per-capita expenditure in 1919 was.....	178.50
Per-capita expenditure in 1920 was.. (approximately)	50.00

Perhaps the normal expenditure per capita as the nation approaches a peace basis will be considerably lower. But to this amount must be added the per capita expenditures for state and county government, and for a considerable portion of the population an extra expense for municipal government. The per-capita expenditures in these local government units according to the latest report of the census bureau, 1913, were:

[1] C. C. Plehn, *Government Finance in the United States*, p. 1.

Per-capita expenditure—state government	$3.95
Per-capita expenditure—county government	4.49
Per-capita expenditure—municipal government	27.29
Total per-capita for local units	$35.73

After due allowance is made for the decrease in the purchasing power of money and for the general increase in wealth, it is still quite evident that public expenditures are growing faster than population and faster than wealth.

Increase in Scope and Character of Government Functions.—Among the chief reasons for the enormous growth of government expenditures, there is, first, the continued growth of military expenditures. Prior to the outbreak of the war in 1914, 50 to 80 per cent of every dollar of public money was used for military purposes. Recently this proportion has, of course, been greatly changed by the colossal expenditures of four years of war, which alone have exceeded the total expenditures of the Federal government from 1789 to 1914. But aside from this enormous increase, expenditures during the past decade have been further augmented by the part now undertaken by the state and national governments in the operation of public works. The government to-day conducts many important activities that a few decades ago were managed by private enterprise. Thus, public ownership and control of the post office, railways, irrigation projects, water, gas, light, and other public utilities have added to the growing list of government expenditures. Likewise, there has been a gradual extension of governmental activities in the fields of education, charities, correction, and philanthropic interests; indeed, there has been an extraordinary growth in public institutions and agencies for the care of the insane and the sick, and for the relief of the poor. All of these agencies have necessitated, not only a great expenditure for their management and maintenance, but also an increasing outlay for measures of a preventive nature. Thus, the government has begun to spend money in the big process of social prevention and

reconstruction. Finally, to all of these must be added the growing cost entailed by the participation of a larger number of people in public affairs. In addition to the increased expense in running government on a democratic basis, "it cannot be denied that, by having a share in public affairs, the masses of the people create expenses which formerly did not exist or existed on a very limited scale."

Lack of Modern Business Methods in Handling Public Finances.—Another feature which tends to augment the cost of operating government is the adherence to antiquated business methods. Unlike the large and successful business concerns of to-day, the governments, whether state or national, frequently employ worn-out and inefficient systems, if such they may be called, in the administration of finance. From the standpoint of business organization, it is claimed, governments have not profited by the progress made in recent years. The same financial system which was in use one hundred years ago, in many instances, is still in vogue, whereas the business and professional world has made rapid strides in administration, organization, and efficiency.

Private and special interests, knowing that privileges and advantages are more readily secured under the present plan, have been accused of blocking changes or at least of neglecting to work for the adoption of more modern and efficient methods in the handling of public funds. One of the most persistent charges made against Federal and state governments is that large sums of money are appropriated in the process of providing for special interests through the method of log-rolling. It is unfortunately true that the efforts of members of Congress and of state legislatures are to a large extent devoted to the task of looking out for special interests and of providing for improvements in matters of purely local concern. Undoubtedly, the increasing public expenditures are due in no small degree to this tendency to drain the public treasury to provide for special

and local interests. The entire scheme of legislation and public administration, it is claimed, is vitiated by this practice of making the legislative machinery function in conformity to a pork barrel and log-rolling system. Whether these charges are well founded or not, the fact remains, unquestionably, that governments have not kept pace with private business in the development of efficient methods in public administration. And little improvement in the handling of governmental finances can be expected until the legislative bodies are taken out of the clutches of a scheme in accordance with which a majority of the members must devote a large part of their time and attention to the distribution of the spoils of politics and to the support of local projects that are a drain upon the public treasury.

To this unbusinesslike manner of parceling out the public funds according to the demands of special and local interests is added the lack of proper methods in accounting and auditing. Attention has only recently been directed to this fact. In many cases no sort of effective system of accounting is employed. The modern methods of cost accounting have only recently been applied to governmental units, and an effective system of audit by efficient and private accountants remains to be established as a permanent feature of public business. On the whole, the system of accounting has been so inefficient and in such form that it has been impossible to compare expenditures in one governmental unit with those in another. It also has been demonstrated that the government handles enormous sums of money without an adequate system of checking. Moreover, governments buy on a large scale, often paying retail rates instead of securing wholesale prices; and take into store great quantities of property, frequently having no method of determining whether this property is protected, cared for, and preserved. Approximately one third of the current expenditures of government are used for the purchase of supplies and materials. The waste and corruption, together with the effect thereof upon

the efficiency of government, in the former methods of purchasing supplies and materials have become notorious. By way of illustration Dr. Frederick A. Cleveland described the condition which prevailed in large cities as follows:

> New York buys probably $15,000,000 worth of supplies and materials per annum for current operation and maintenance. Yet it pays higher prices than are paid by persons who buy at retail for a small family. It buys in wholesale quantities, but does not obtain wholesale rates. It pays cash, but does not get either trade or cash discounts. It takes millions of goods into stores without holding anyone to account. It has little protection against deliveries short in weight and inferior in quality. It is safe to say that approximately $5,000,000 of every $15,000,000 spent for supplies and materials is worse than wasted.[1]

A further question involved in the securing of efficiency in the management of government finances is whether it is necessary that higher salaries be paid, shorter hours be provided, and less work per hour be required in the government service than in private business. Cabinet officers frequently claim that they secure from government clerks only one half to two thirds of the work that they secure from private employees. It is well known that the average person gives less time and less service when holding a government clerkship than the same person would give if employed by a private business manager. Is this decrease in efficiency and the added expense which it involves a necessary and indispensable feature of democratic government?

Proposed Reforms

Among the reforms proposed to correct the defects are:

Legislative Reorganization.—The reform of the present inefficient methods must begin, it is maintained, with improvement in our legislative machinery. The system of appropriating money in Congress and in the state legislatures must be radically changed. Little progress can be expected as long as the individual members of the legis-

[1] F. A. Cleveland, *Municipal Administration and Accounting*, pp. 28–29.

lative bodies can by special bills draw upon the public treasury. The expenditures of public money must, it is thought, be concentrated in the hands of the executive or some other responsible authority, and the power to introduce bills involving expenditures must be taken from the individual members of Congress and of the state legislatures. Most of the expenditures which are now authorized by special bills and controlled by private interests could be handled by the executive departments and thus controlled effectively. Such a change would free the members of the legislature from the dominance of private and local interests, and, as a result, their time could be given to public affairs and the real function of legislation.

Adoption of a Budget System.—An adequate budget system is also thought necessary for the Federal government and for the state governments. In order that a budget system may be rendered effective, closer co-operation between the executive and legislative departments is essential. The control of the budget should be placed in the hands of the executive or an executive board whose duty it shall be to present a unified and systematized budget to the legislature, where separate amounts can be reduced but not increased.

Introduction of Improved Accounting and Auditing Methods.—A thoroughgoing system of accounting, of auditing, and of financial reports is regarded as a prerequisite to the putting of government on a basis of efficiency. The best systems of cost accounting that have been applied by private establishments should at once be introduced into the financial management of government departments. Arrangements should be made also for central purchasing agents who can avoid duplications and secure wholesale rates and unify the buying of large quantities for governmental purposes. Finally, complete and adequate systems of auditing and checking expenditures are indispensable.

Full publicity, through the publication of intelligible re-

ports, is also necessary in order to bring about needed reforms. A useful device in this connection is an annual budget exhibit in which expenditures for various purposes can be intelligibly presented to those interested. Such budget exhibits have been prepared in numerous cities with a consequent appreciation on the part of the people of the difficulties involved in the administration of the finances of the city. Budget exhibits similarly framed would be invaluable for bringing before the public a graphic account of the status of state and national finances.

Centralized Control Over the Purchase of Supplies and Materials.—A movement to overcome the waste incident to government purchases, by the establishment of centralized purchasing bureaus, has been inaugurated in a number of the large cities, notably among which is New York City. The plan of centralized control over purchasing has also been adopted by some of the states, at first, in their attempt to secure a better system of securing supplies and materials for charitable and eleemosynary institutions, and later, in their efforts to put all state purchases on a more business-like basis. Mr. Buck has summarized the principles and procedure involved in the establishment of centralized purchasing systems:

> There have developed four distinct types in the organization of the state purchasing agencies, which are in the order of their efficiency as follows: (1) Division of a department under reorganized and consolidated administration; (2) independent department headed by single officer; (3) board of control exercising purchasing functions; and (4) board of ex-officio members with purchasing powers. The purchasing systems of Illinois and Idaho are examples of the first type. In both cases purchasing is placed under the department of public works. Responsibility for the work is fixed, and full co-operation with other departments under the consolidated administration is established. Examples of the second type of purchasing organization are those of California, New Jersey, Michigan, New Hampshire, Ohio, and Vermont. In these states responsibility for purchasing is largely fixed in a single person, called the purchasing agent, who heads a department practically independent of other state departments and agencies. This seems to be the form of organization for efficient purchasing work

best adapted to those states which have not reorganized and consolidated their administration. In every case, except Ohio, the purchasing agent is appointed by the Governor. In Ohio the purchasing agent is responsible to the Secretary of State. In California and Vermont he is under supervision of the state board of control, and in New Jersey he is under the State House commission. The third type, where the purchasing is left to the state board of control, is found in Alabama and Texas. The board of control is an attempt to consolidate the administration, especially of state institutions, looking toward more efficient management. However, it at once introduces board government, which for purely administrative purposes is regarded as inefficient, unbusinesslike and irresponsible. But even setting aside these objections, a board of control, burdened with fiscal, administrative, managerial and quasi-legislative functions, can hardly be expected to initiate and carry out an efficient system of purchasing. Examples of the fourth type of purchasing organization are those of New York and Wyoming. In these states the authority to purchase is vested in boards composed of state officers serving ex-officio. The members of such boards are charged with numerous other duties and, therefore, have very little time to give to the purchasing work. The work, if it is to be done, must be delegated to some person or group of persons. This is the case in New York, where the purchasing work is delegated to a subcommittee, and responsibility for the results is thereby practically dissipated.[1]

The objects to be attained by this device are:

(1) The concentration of purchasing power, permitting goods to be bought in large quantities at the lowest and best prices under competitive bidding and promoting prompt delivery, inspection and payment for the goods, with the minimum inconvenience to dealers; (2) the standardization of supplies, eliminating unnecessary range in kinds of goods, also unduly expensive grades; and (3) the development of an expert purchasing staff, acquainted with the details and skilled in methods of the several phases of purchasing, inspecting, and testing and storing goods.[2]

The Efficiency Movement vs. Popular Control of Government

The movement for efficiency in the management of political affairs runs counter to one of the primary principles

[1] A. E. Buck, "The Coming of Centralized Purchasing in State Governments," Supplement to the *National Municipal Review*, vol. ix, no. ii, pp. 134–135.

[2] *Ibid.*, p. 117.

on which the American government was founded, namely, that the preservation of liberty and individual initiative is more important than the maintenance of strong government. Strong government was identified with tyranny, and tyranny was to be avoided at any cost. Moreover, popular participation in government in the United States was extended on the theory that it was desirable to interest many citizens in the conduct of political affairs even though there might be some loss in vigor and effectiveness of administration. From a belief in this and similar theories, regarded as essential to democratic government as conceived in America, came a tolerance of governmental imperfections which were regarded as the necessary price for the maintenance of democracy in government. The conflict between this fundamental tenet of American political philosophy and the standards and ideals of the efficiency movement is aptly put by Professor Ernst Freund in these words:

> Had a commission of economy and efficiency presided over American government from the beginning, it would tax the imagination to think of the millions that might have been saved from waste; but could there have been that spirit of individualism, that glamour of liberty, that made American institutions attractive to aliens coming to this country, and that made possible a national assimilation and consolidation which is without parallel in history? Surely that is a political asset which no mere technical perfection of government could have won for us, and it warns us not to value the traditional essentials of American institutions too lightly.[1]

European nations have secured efficiency in government by the establishment of a bureaucracy or a professional and permanent class of public officials. American principles and ideals do not at present sanction the control of government by a bureaucracy. It remains to be seen whether American principles of democracy are compatible with the principles of efficiency and economy, or whether democratic government necessarily means inefficient government.

[1] "Principles of Legislation," *American Political Science Review*, vol. x, pp. 1–2.

Among the leaders who have defended the democratic management of government there have been two distinct groups. Some, following the tenets of Jefferson, trust the good sense and judgment of the people to select, in the long run, those who by training, experience, and general ability are qualified to be the natural leaders of state and nation. This group regard it as the function of the electorate to select such leaders and to give them public support. According to this group, there is no inherent reason why democratic government cannot be as economical and efficient as monarchy or bureaucracy. Others, following the precepts formulated by Jackson and his successors, contend that rotation in office is necessary to prevent the development of bureaucracy and to interest and educate the masses in the operation of government. To those accepting this philosophy it is much more important to keep the government near to the sources of public power and to keep the people interested and satisfied than to save money or to secure efficient services. The great problem to-day is to reconcile the principles and philosophy of these two groups and to introduce such features of the movement for efficiency and economy as will not run counter to the fundamental tenets of American democracy.

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CHAPTER II

PROBLEMS IN THE REGULATION AND CONTROL OF PUBLIC UTILITIES

The Nature of the Utilities Problem

The Distinction Between Public and Private Utilities.—The enterprises for the satisfaction of the common needs of man may be classified as private and public. Most of man's wants are satisfied by individuals who provide commodities and perform services for the profit that may thereby be gained. In the cases where the rendering of these commodities and services becomes of interest to the public the agencies performing them have come to be known as public utilities. Some of these utilities have become so important that the government has taken them over and operates them at cost or for a very slight return in addition. Sometimes the service may even be supplied at a loss and the deficit made up by means of taxation. Among the utilities which have become public in nature, and are either operated by the state or placed under public control are carriers, ferries, roads, wharves, telegraphs and telephones, and, to a limited extent, grist mills and lumber mills. Furthermore, if the individual puts private business to a use in which the public has an interest, it becomes subject to supervision and control. Instances of this character include the grain elevators and insurance companies which the United States Supreme Court has held are of such a character as to justify the regulation and control thereof by the public.[1] Another example is afforded by the press.

[1] See cases of Munn *vs.* Illinois, 94 U. S. 113, and German Alliance Insurance Company *vs.* Ike Lewis, 233 U. S. 389.

The Associated Press [says Justice Philips], from the time of its organization and establishment in business, sold its news reports to various newspapers who became members, and the publication of that news became of vast importance to the public, so that public interest is attached to the dissemination of that news. The manner in which that corporation has used its franchise has charged its business with a public interest. It has devoted its property to a public use, and has, in effect, granted to the public such an interest in its use that it must submit to be controlled by the public for the common good to the extent of the interest it has thus created in the public in its private property.[1]

To quote the language of one of the courts,

. . . one of the great requirements which the government demands of every institution impressed with a public interest . . . is the duty to act impartially to all. They are under obligations to extend their facilities to all persons on equal terms, who are willing to comply with their reasonable regulations, and to make such compensation as is exacted from others in like circumstances.[2]

Importance of Public Utilities.—The regulation and ownership of public utilities are among the most difficult and intricate problems of modern government. For the average citizen the government renders many services. It takes care of the roads, streets, and sidewalks. It gives protection from theft, from trespass upon property, and from the spread of contagious diseases. It renders aid in case of fire or of threatened injury to life. It establishes systems of education and means of caring for the sick, the defective, and the insane. But in addition to being dependent upon all of these services, the comfort and welfare of citizens are greatly dependent upon the large public utilities owned and controlled usually by private corporations. The citizen who lives in a city or town must rely in no small degree, and in some cities entirely, upon private corporations for transportation by street railways and for communication by telephone and telegraph, and in many cities he must look to private agencies for water, gas, and light. The three utilities last mentioned, however, are

[1] Bruce Wyman, *Cases on Public Service Companies* (Second Edition), (Harvard Law Review Association, 1909), p. 43. [2] *Ibid.*, p. 35.

passing more and more under municipal control. For the general conveniences, then, the average citizen is dependent upon private corporations; for the protection of life and property, and for educational facilities, streets, and roads he is dependent upon the agencies of the government.

Few indeed realize the vast scope and increasing importance of public utilities. In a recent tabulation all of the active capital in the United States in the year 1910 was estimated at 47,961 millions, and of this amount 23,319 millions was accredited to public utilities. The significance of the public utilities of municipalities and their relation to the general welfare may be gathered from the following table, prepared by a former director of public works of the city of Philadelphia.[1]

PUBLIC UTILITIES

Paper Value or Value Measured by Securities.	An Estimate of Actual Value of Property.
$391,000,000	$242,200,000

When these amounts are compared with the estimated value, $246,869,000, of all other public property in Philadelphia, their importance is obvious. As indicated in these estimates, the paper value of the public utilities is greater than that of all the other property of the city, while if the conservative estimate of Director Cook may be accepted, the actual value is just about equal to that of all the remaining municipal property.

Thus it is evident that in a large city, on account of the peculiar dependence of the citizen upon the public utilities in the conduct of his business and social affairs, and on account of the investment of such vast amounts of capital, the problem of the regulation and control of public utilities is one which in a certain measure overshadows all other municipal problems. To deal efficiently with, and to regulate

[1] M. W. Cooke, "Snapping Cords," Comments on the Changing Attitude of American Cities Toward the Utility Problem, p. 9.

justly, private corporations which furnish so many of the conveniences, comforts, and necessaries of life, equivalent in value to all the houses, buildings, lands, and improvements of a city, constitutes a problem which requires the most careful consideration and the most thorough treatment by those who are interested in the public welfare.

Charters and Franchises.—The public utilities which render such important services secure their right to do business through legislative acts or through similar authorizations granted by municipal councils. The authority by virtue of which private individuals and corporations exercise the right to use the roads and the streets in distributing commodities and rendering services to citizens is commonly known as a franchise. Franchises are in the nature of special privileges by virtue of which the owners can render services to the public for private gain. Formerly, when franchises were granted, it was customary for the state legislature or the city council to grant perpetual or long-term charters without specifying conditions of service or determining rates or limiting the amount of capital stock to be issued. An illustration of the condition which prevails under such franchises was recently furnished when the gas company of a large city increased the rates on gas 20 per cent and it was publicly announced that the company could raise its rates at will and, if it so desired, without even the formality of advising the city council.

Freedom from Regulation and the Development of Evils.—The public at first had little or no defense against corruption or the evils resulting from the selfish designs of utility owners and managers. There was a proceeding known as "quo warranto," by which the charters of corporations might be forfeited, but this remedy was so difficult to apply that it was seldom called into use. It was customary not only to grant freely these long-term or perpetual franchises, but also to give encouragement to corporations to begin undertakings for the benefit of the public. Communities were thought thereby to gain in importance, and the de-

velopment of such utilities was looked upon as a measure of progress which the community ought in every way to encourage. The existence of these conditions, permitting the bartering away of valuable rights through bribery and other corrupt practices, and resulting in the dominance and control of politics by these recklessly created corporations, forms a discouraging chapter in the story of machine politics in the United States.[1] The lack of regulation and control under the long-term franchises resulted also in the development of certain evils which have rendered this unregulated condition intolerable, and have called for a well-defined system of national and state regulation of utilities. The street railway, gas, and electric companies, once having secured their charters, proceeded to devise ways and means by which their profits might increase. Unfortunately, these companies prospered most under the conditions obtaining in what is known as the "wide-open town." The highest profits were secured when pleasure resorts, saloons, and all sorts of social centers were encouraged. It thus became a matter of special interest to the utility companies to join with the liquor interests in keeping the saloons and pleasure resorts wide open. According to Doctor Wilcox:

> A street railway has to be operated seven days in the week and in the larger cities all night long. The profits of the enterprise depend largely on the stimulation of traffic at odd hours. A crowd of people in town on a Sunday means profit to the street railways. A bunch of revelers going home in the wee, small hours makes the owl cars profitable.

Gas and electric companies were similarly interested in wide-open policies, and particularly in securing profits from resorts which run into the late hours of the night. This

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[1] *Cf.* C. E. Russell, *Stories of the Great Railroads* (Charles H. Kerr & Co., 1912), and statement by Albert M. Todd, president of the Public Ownership League of America, before the Committee on Interstate Commerce, Sixty-fifth Congress, Third Session, February 21, 1919.

condition accounts for the peculiar combination of interests which go to form the so-called machine in many communities—the office-seekers and job-hunters, the public utilities, the saloons, the gambling interests, and the pleasure resorts.

Along with the policy of encouraging the saloons and pleasure resorts the utilities developed a system of special rates and rebates which proved to be nothing short of scandalous. Gas companies, for example, rarely sent bills to influential politicians. Regular systems of rebates were provided by telephone companies. Moreover, street railways distributed passes freely to those who might in some way or other render the path easier for future stock issues or the securing of more liberal ordinances. The extreme measures to which corporations were sometimes obliged to go in the pursuit of this policy were described by Mr. Brooks, vice president of the Pennsylvania Railway Company, as follows:

> . . . I have seen the evils of the pass system grow from very small beginnings to what I regard as very great and deplorable proportions. I have tried to persuade officials of other railway companies to follow my example, and I have endeavored to persuade the legislature of Ohio, in which state I have always lived, on different occasions, to pass prohibitory laws on this subject, but in each instance and always, without avail. There was a time when public officials were content to receive occasionally a trip pass for themselves. They have learned to ask for passes for themselves, for members of their families, and for political adherents and others. They not only ask for passes good over lines which are controlled by the officers to whom they apply, but they ask for passes over connecting lines to distant and remote parts of the country, good at all seasons of the year. They not only ask for trip passes for themselves and their friends, but they ask for annual passes for themselves and their friends; and no matter how many passes may be granted to a single individual, if a single request be refused, the enmity of that official is aroused and his vengeance is exercised if he has an opportunity so to do.
>
> I have known a member of the Supreme Court of the United States to apply for free transportation the money value of which, in a single instance, was between two and three hundred dollars. Governors of states, United States Senators, members of the House of Representa-

tives, members of every department of state government, from the Governor to the janitor, ask and expect to receive these favors.[1]

Although the serious evils resulting from the liberal granting of passes have been abolished by legislation and by voluntary action on the part of railroads themselves, the system of gratuities and special advantages have by no means been entirely eliminated.

Not only did the public-service corporations thus foster a system of discrimination and systematic rebating, but they also found it necessary to keep in close touch with politics because they were interested in the construction of new enterprises and in the securing of liberal grants for future extensions. They found it still more necessary to be able to rely upon a favorable attitude of the courts of justice, for it was to the courts that the utility companies had to look for the determination of their rights and privileges and their protection from aggression or interference. Thus, the companies, joining usually with the larger interests, took an active part in political campaigns, contributed freely to the campaign funds, and kept a close watch upon prospective candidates. A close combination was often formed between the utility owners and the political leaders of the community; and the connection between public-utility corporations and politics became especially close and intimate. The basis for a certain type of machine in American politics was laid in the combination of public utilities with other interests similarly desirous of securing liberal regulations from the government.

Finally, the freedom from regulation of corporations led to the extensive over-capitalization, or watering of stock, which has been so characteristic of corporate management in the United States. It became customary to capitalize plants on the basis of operating possibilities and to require

[1] Revised Record of the Constitutional Convention of New York, 1894, vol. iv, no. clxiv, pp. 483 ff; reprinted in C. A. Beard, *Readings in American Government and Politics* (New and Revised Edition), (The Macmillan Company, 1913), p. 479.

the consumers to pay dividends on fictitious values created by the growth and development of the corporation. The advantages to be derived by the companies from copious stock watering were the paying of the promoters in stocks and bonds and the checking of legislative interference designed to reduce rates and improve service. Having greatly inflated stock issues, companies could maintain that they were either losing money or paying a low dividend on the investment.

The combination, then, of the public utilities so as to form the machine with its baneful influence in American politics, the extension of the system of special fares, passes, and discriminative rebates, the over-capitalization, or watering of stock, which rendered it impossible to know when a corporation was overcharging its patrons—all combined to force upon the attention of the public the evils of an unregulated system of private ownership of public utilities.

The Regulation of Public Utilities

Need of Regulation.[1]—The regulation of utilities was found to be necessary to protect the citizen against discrimination as to rates and services, for the individual consumer was without remedy against such discrimination and scant courtesy was often accorded to his protests. Then, too, the patron was entitled to fair and reasonable rates and services, which were obtainable only through a system of public regulation or public ownership. Since public utilities, when controlled by private ownership, are operated with a view to profits and often to very large profits, it became necessary to afford the public some protection against the undue avarice of private corporations. Regulation became necessary, also, for the protection of the community in matters of health and sanitation, for the health

[1] *Cf.* C. L. King, *The Regulation of Municipal Utilities* (D. Appleton & Co., 1912), chap. i.

of a community can be secured only by common control over such matters as water and food products. Regulation was necessary, likewise, in order that utilities might not expand and develop in such a way as to endanger the development and the reasonable progress of a community. Citizens had to be protected from overcrowding and from unwholesome surroundings.

Finally, regulation of public utilities became necessary to prevent the dominance of special interests in the management of government. Only in this way, it was believed, could be eliminated the methods whereby a few individuals may seek and secure governmental favors and assistance in operating a business run for private profits. All of these conditions led to a demand for government control over public utilities.

The results of the individualism that has held sway for the greater part of the last century have been so great in commercial and industrial fields that the nation and states have been forced to take measures to check a continuation of business methods which were designed for such purely selfish ends. It has been said, "Our age is so strongly commercialized, and corporations have been allowed to practice all sorts of abuses and conduct their business without effective regulation so long, that in the present backward condition of political education the private corporations are stronger than the governments." Various methods of holding the greed of corporations in check and of securing a more equitable distribution of returns have been tried, but with no positive degree of success.

The ordinary means of redress that have been resorted to are lawsuit, legislative control in granting of franchises, and the referendum. The method of carrying a grievance through the courts, with the possibility of receiving little satisfaction and perhaps losing everything, offered little encouragement to the individual to try to obtain justice from a corporation by means of a lawsuit. Legislative

control likewise has, on the whole, proved inefficient, for here again it is difficult for individuals to obtain satisfactory legislation against the power and influence of corporate interests. A referendum on franchises carries one advantage with it, in that the public has an opportunity to learn the nature of franchises, but once a franchise is granted there is little chance of redress for individuals against the corporation which owns and controls the utility. These three safeguards of the interests of the public having been proved, in large part, inadequate, other expedients are being resorted to—namely, utility commissions and public ownership, which latter appears to be gaining in favor.

In nearly all of the states there have been formed state commissions and, for cities, city commissions. The Interstate Commerce Commission has been organized to settle questions which involve the management of public traffic between the states. The main functions of each of these regulatory bodies may be briefly stated.

Regulation of Railroads by the Interstate Commerce Commission.—One of the most important problems in public-utility regulation is that of the regulation and control of railroads. Until the passage of the Interstate Commerce Act of 1887, railroads were controlled in the United States by state laws. Under the policy of state regulation certain evils had developed which rendered national regulation necessary and inevitable. Among these evils was the practice of making discriminations and rebates, whereby a large shipper received a secret count or rebate of part of the regularly published charge. The railways frequently had oral or written agreements providing for the return of part of the freight charged. As an example of this practice, it was proved in court that one railroad charged a large shipper a rate of 10 cents per barrel on oil, while his competitors were paying 35 cents per barrel; and the railway, furthermore, paid to the large shipper the sum of 25 cents per barrel on his competitors' freight. Thus the difference

between his rate and that charged the smaller shipper was 50 cents per barrel.

Although the Interstate Commerce Act renders the granting of discrimination and rebates illegal, the practice has not been entirely abandoned, a fact evidenced by the trial of 1906, as a result of which four railways and three industrial combinations were fined for rebating and some of the traffic managers were compelled to pay penalties. Further abuses in the management of railways were found in the private-car system, through which discriminations crept in as between large companies and the small shippers. Also, in the matter of car supplies the large freight companies were receiving advantages over competitors and were being favored by discrimination in railway and terminal facilities.

All of these evils led to the passage of the Interstate Commerce Act, which provided a regulative commission of seven members appointed for seven years, with authority to control the railways. This authority has been extended to cover private car lines, sleeping cars, parlor cars, express companies, pipe lines, telegraph and telephone companies. The commission was given, by the Act of 1887 and subsequent amendments, authority to require information, to prescribe a uniform system of accounts, and to secure reports on earnings. Discriminatory contracts and rebates were prohibited. Charges and rates may be suspended by the commission or may be investigated by it as to their justice and reasonableness. By act of Congress of January 18, 1910, railways are prohibited from charging more for a short haul than for a long haul over the same line in the same direction, except with the consent of the commission.

The Interstate Commerce Commission was limited in its power by the lack of authority to compel witnesses, and by the provision that its orders could be enforced only by equity proceedings in Federal courts. Although the commission was not at first very well supported by the courts, it has gradually strengthened its position, and its powers

have been extended by Congress, until it now exercises an effective restraining control over the railroads and other public utilities of the nation. Rebates have been rapidly decreased, if not entirely abolished. Through fines and vigorous prosecutions the commission has forced the railroads to recognize its regulative power and authority and has abolished many of the unfair practices of former days. About 75,000 complaints are received and considered annually by the commission. Through its power of investigation the commission has been able to bring about a revolution in the methods of handling public transportation.

A long controversy was waged over the commission's power to regulate rates for interstate commerce and to affect and incidentally regulate rates for intrastate commerce. This controversy was settled in favor of the commission in the famous Shreveport case, in which it was held that the commission had authority to fix rates for interstate commerce from Shreveport to points within Texas, and that the railroads of Texas must refrain from charging higher rates for transportation from Shreveport to Dallas and Houston than are charged for the transportation of such articles from Dallas or Houston toward Shreveport for an equal distance.[1]

The broad powers granted to the commission were thus defined by Justice Hughes:

> While these decisions sustaining the Federal power relate to measures adopted in the interest of the safety of persons and property, they illustrate the principle that Congress, in the exercise of its paramount power may prevent the common instrumentalities of interstate and intrastate commercial intercourse from being used in their intrastate operations to the injury of interstate commerce. This is not to say that Congress possesses the authority to regulate the internal commerce of a state, as such, but that it does possess the power to foster and protect interstate commerce, and to take all measures necessary or appropriate to that end, although intrastate transactions of interstate carriers may thereby be controlled.

[1] Houston, East and West Texas Railway Company *vs.* United States, 234 U. S., 347 ff.

The principle is applicable here. We find no reason to doubt that Congress is entitled to keep the highways of interstate communication open to interstate traffic upon fair and equal terms. That an unjust discrimination in the rates of a common carrier, by which one person or locality is unduly favored as against another under substantially similar conditions of traffic, constitutes an evil is undeniable; and where this evil consists in the action of an interstate carrier in unreasonably discriminating against interstate traffic over its line, the authority of Congress to prevent it is equally clear. It is immaterial, so far as the protecting power of Congress is concerned, that the discrimination arises from intrastate rates as compared with interstate rates. The use of the instrument of interstate commerce in a discriminatory manner so as to inflict injury upon that commerce, or some part thereof, furnishes abundant ground for Federal intervention. Nor can the attempted exercise of state authority alter the matter, where Congress has acted, for a state may not authorize the carrier to do that which Congress is entitled to forbid and has forbidden. . . .

It is for Congress to supply the needed correction where the relation between intrastate and interstate rates presents the evil to be corrected, and this it may do completely, by reason of its control over the interstate carrier in all matters having such a close and substantial relation to interstate commerce that it is necessary or appropriate to exercise the control for the effective government of that commerce. . . . Congress is entitled to maintain its own standard as to these rates and to forbid any discriminatory action by interstate carriers which will obstruct the freedom of movement of interstate traffic over their lines, in accordance with the terms it establishes.

Having this power, Congress could provide for its execution through the aid of a subordinate body; and we conclude that the order of the commission now in question cannot be held invalid upon the ground that it exceeded the authority which Congress could lawfully confer.[1]

Government Control of Railroads During the War.—After various efforts to organize the railroads under private ownership so as to co-operate with the government and to meet the extraordinary conditions created by the war, the Interstate Commerce Commission recommended, on December 1, 1917, that the only way to meet the needs of the government and the public was to bring about a complete unification of the railroads under the direction of the government. In the previous summer Congress, in the

[1] Houston, East and West Texas Railway Company *vs.* United States, 234 U. S., 342, 353–355.

Army Appropriation Act, had authorized the President to take over the railroads and water transportation systems, with the exception of such branch or private lines as might be specially designated. On December 26th the President announced that the railroads and water transportation systems would be taken over by the government and placed under a director-general, the Secretary of the Treasury having been selected to fill this position. Under the director-general there were established:

1. A central administration, comprising divisions of Finance and Purchases, Capital Expenditure, Operation, Traffic, Public Service and Accounting, Labor, Land, and Inland Waterways.
2. Regional administration, comprising a regional director, a general staff, district directors, and a Federal manager for each road.
3. Advisory commissions, such as a Board of Railway Wages and Working Conditions, a Port and Harbor Facilities Committee, an Exports Control Committee, and a Committee on Inland Waterways.

Among the changes introduced by the director-general and his staff was a general increase in wages to all laborers and employees receiving less than $250 per month. Freight rates were rearranged to eliminate circuitous routes, to reduce cross routing, and to reduce congestion. Joint use of terminals, equipment, and repair shops was instituted, as well as other measures to facilitate the most effective use of the railroad properties to meet the emergency conditions due to the war.

By the Federal Control Act of March 21, 1918, the railroads were guaranteed the average annual operating income for the three years ending June 30, 1917, the amount for each road to be ascertained by the Interstate Commerce Commission. The President was accorded extensive powers to carry out the provisions of Federal regulation and control.

Federal control over the railroads was extended by the Esch-Cummins Act of February 28, 1920, which provided for the termination of government possession of the roads during the war time. This act, after providing

for the restoration of the railroads to their owners, extends Federal control in certain respects which deserve brief mention. In the first place, there is established a Railroad Labor Board to be composed of nine members, to be distributed as follows: Three members to represent employees and officials, three to represent the carriers, and three to represent the public. Nominations in each group are to be made by the parties interested, under regulations to be prescribed by the Commerce Commission, and appointments are to be made by the President by and with the advice and consent of the Senate. All controversies between carriers and employees or officials which are not adjusted by the parties concerned and are likely to interrupt commerce may be appealed to this board, whose duty it is to determine disputes and to "establish rates of wages and salaries and standards of working conditions which in the opinion of the board are just and reasonable." For the adjustment of disputes over working conditions and other grievances there are to be regional boards similar to those established by the railroad administration under government control during the war.

The Interstate Commerce Commission is enlarged, and Federal regulation is made to apply not only to rail transportation and to commercial and water transportation by common carriers, but also to all interstate wire and wireless transmission and to transportation of all commodities except gas by pipe line. In case of a shortage of equipment or a traffic congestion, the commission may order joint and common use of terminals to meet the emergency. The commission is directed to prepare a plan for the consolidation of existing roads into a limited number of systems.

But most important of all, the commission is required to establish rates which will enable each group of carriers, arranged according to districts, to secure under efficient management a fair return upon the value of the property of these carriers. The commission determines what percentage shall be a fair return. For the two years commenc-

ing March 1, 1920, such a fair return shall be from 5½ to 6 per cent. Income in excess of 6 per cent is to be divided annually between the carrier and the government. New issues of capital stock or securities by the railroads must be approved by the commission.

Problems which remain undetermined are the status and powers of state utility commissions, the attitude of the government toward railroads which are unable to pay any return on investment, and the ultimate prospect of public ownership. Where governments go so far in the direction of regulation as the Federal government has gone in the case of the railroads, the logic and practical aspects of the situation appear to require an extension of that control until public ownership becomes a necessity. Can the government assure a fair return on railroad properties without extending control and ultimately assuming ownership?

State Railroad and Utility Commissions.[1]—In addition to the regulation of railways by the Interstate Commerce Commission, the states likewise began to establish regulatory bodies. Commissions were provided by law, especially in the Western states, with power to regulate rates and to control service and railway capitalization. During the time that the authority of the Interstate Commerce Commission was weak and ineffective, state commissions aided in reducing irregularities and discrimination in service and in checking some of the grosser evils in railway management. But two difficulties have tended to discredit state railroad commissions. In the first place, as many of the railroads cross state boundaries, it was often impossible to secure the information essential to effective regulation, and, when the information was available, state authorities could not enforce restraining orders without interference with interstate business. In the second place, there was a tendency in legislatures and state commissions

[1] *Cf.* "Commission Regulation of Public Utilities: A Survey of Legislation," by I. Leo Sharfman, *Annals of the American Academy of Political and Social Science*, May, 1914, p. 1.

to fix flat rates for traffic, which were regarded as depriving the railways of a fair return on investments, and, consequently, the courts restrained state authorities from enforcing such rates.

Although the state railway commissions have lost in authority and prestige as the powers of the Interstate Commerce Commission have increased, it was their experience in the regulation of railroads that encouraged the states to intrust to regulatory bodies the control over other public utilities, such as warehouses, telephone and telegraph companies, gas and electric light companies, and street railways. Some states have retained their railway commissions and have created a second body known as a public service commission, while others have combined the functions with both types of commission into a single board. The purposes of these commissions are to protect the public as to services and rates, to prevent discriminatory treatment, and to safeguard the utilities from radical and confiscatory legislation. It was the intention of those who favored the establishment of such commissions that the control of corporations should be taken out of politics, and that the procedure in securing redress for injuries should be made more informal, speedy, and inexpensive.

The chief features of commission acts are:[1]

1. Provisions to regulate the granting of franchises in order to avoid duplication of utility properties and to arrange for the operation of utilities subject to control of rates and services.

2. Authority to supervise the issue of stocks and bonds.

3. Power to prevent unjust discrimination, to prescribe publicity in the making of rates, and to fix rates in accordance with certain defined principles.

4. Authority to regulate accounts and reports in order to secure the data essential to regulation.

The determination of rules of procedure and practice is left largely to the commissions. The findings of the

[1] *Cf.* I. Leo Sharfman, "Commission Regulation of Public Utilities: A Survey of Legislation," *Annals of the American Academy of Political and Social Science*, May, 1914, pp. 11 ff.

commissions are under certain circumstances made final; and this authority has in many instances been approved by the courts on the ground that commission regulation of utilities is a necessity, and that it would be impossible for the courts to retry all of the commission cases. But the finality of commission orders has been subjected to a limitation which has had a marked effect upon recent efforts of regulatory boards. This limitation is stated by the Supreme Court as follows:

> The orders of the commission are final unless (1) beyond the power which it could constitutionally exercise, or (2) beyond its statutory power, or (3) based upon a mistake of law. But questions of fact may be involved in the determinations of questions of law, so that an order, regular on its face, may be set aside if it appears that (4) the rate is so low as to be confiscatory and in violation of the constitutional prohibition against taking property without due process of law, or (5) if the commission acted so arbitrarily and unjustly as to fix rates contrary to evidence, or without evidence to support it, or (6) if the authority therein involved has been exercised in such an unreasonable manner as to cause it to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power.[1]

Since the courts have held "that the basis of all calculations as to the reasonableness of rates to be charged by a corporation must be a fair value of the property being used by it for the convenience of the public," and that the determination of fair value is ultimately a judicial question, this power of review reserved by the courts has rendered regulatory bodies impotent to deal with certain of the abuses of private ownership and operation.

The Wisconsin Public Utility Law.[2]—A description of the Wisconsin utility law will indicate the functions performed by a representative state commission. The Wisconsin law, which was enacted in 1905, was originally intended to apply to freight and passenger traffic, express, private-car and sleeping-car traffic, and street and interurban lines. The

[1] See Smyth *vs.* Ames (1898), 169 U. S. 466, and Minnesota Rate Cases (1913), 230 U. S. 352.

[2] Condensed from Fred L. Holmes, *Regulation of Railroads and Public Utilities in Wisconsin* (D. Appleton & Co., 1915).

rates fixed by the commission were to be absolute, and it was intended that the commission should control all phases of the problem of public-utility service, including safety, convenience, and sanitation. Two years after the passage of the act, the legislature extended the powers of the commission to include light, telephone, water, heating, and telegraph companies. In 1911, toll bridges were added, and in 1915, jitneys were brought under the authority of the commission. The legislation was deliberately designed to cover rates and service, both of municipal and of private plants, and the powers of the commission were stated in broad terms, as follows:

> The commission shall have general supervision of all public utilities, shall inquire into the management of the business, and shall keep itself informed as to the manner and method in which the business is conducted. It shall examine such public utilities and keep informed as to their general conditions, their franchises, capitalization, rates and other charges, and the manner in which their plants, equipments, and other property owned, leased, controlled, or operated, are managed, conducted, and operated, not only with respect to the adequacy, security, and accommodation afforded by their service, but also with respect to their compliance with the provisions of this act and any other law, with the orders of the commission and with the charter and franchise requirements.[1]

To strengthen the powers of the commission, the legislature repealed in 1911 all of the utility franchises in the state and granted, in lieu thereof, indeterminate permits. This act was rendered possible by the fact that the Wisconsin constitution grants to the legislature the power to alter or repeal any franchise granted. No competition is to be permitted with an existing utility unless in the judgment of the commission public convenience and necessity demand it. The legislature has recently extended the right and authority of municipal ownership, giving the authority to purchase and manage interurban lines.[2] The extent of the

[1] Acts, 1913, House Bill No. 907, Sec. 8.

[2] F. L. Holmes, *Regulation of Railroads and Public Utilities in Wisconsin* (D. Appleton & Co., 1915), pp. 5–8.

commission's powers has been thus described by Prof. J. R. Commons:

> Every public utility in the state, except streets, highways, and bridges, is brought within its jurisdiction. It becomes also a local government board, for it regulates towns, villages, and cities in their management of these undertakings. Its authority is great and far reaching. It employs experts and fixes their compensation..... It enters into the daily life of the people more than all of the other agencies of government combined.[1]

Property approximating $500,000,000 was brought under the supervision and control of the public-utility commission. The ordinary method is to hear complaints, to investigate conditions, and to render verdicts as to the proper method of procedure for the utilities. The commission has been given additional duties, including (1) the preparation of accounting and statistical data for use in official cases; (2) the preparation of similar data for informal cases; (3) accounting work, comprising the auditing and checking of financial records; (4) the keeping of the files for public-utility rates, rules and regulations, and the preparing of the rates for publication; (5) the determination of unit costs as provided by law; (6) the compilation of material for reports.[2]

For the purpose of taxation, as well as regulation, it was soon found necessary to provide for the physical valuation of railways. The tax commission of the state discovered that railroads paid only 53 per cent of their market value in taxes, and that house owners and others paid 119 per cent, or twice as much. As a result of these and other revelations, the legislature provided for a physical valuation of the railways and placed the direction of this under the railroad commission. The commission was compelled to decide on a basis of fair value; and while various possibilities were considered and used somewhat in determining the valuation, the system adopted by the commission in

[1] *Review of Reviews* (August, 1907), vol. xxxvi, p. 224.

[2] F. L. Holmes, *Regulation of Railroads and Public Utilities in Wisconsin* (D. Appleton & Co., 1915), p. 14.

determining fair value was to consider "the original cost of construction, the amount expended in permanent improvement and extensions, the reproduction cost new, less depreciation, and going value."[1] To eliminate fluctuations in market prices due to temporary causes, specific costs were based on material and labor prices for five years prior to the appraisement. No fixed rule has been laid down as to the determination of fair value, the commission rendering a decision according to its judgment and the facts as brought forth.

One of the most difficult duties of the commission was to determine what was a fair rate of return upon a utility property, assuming that the value of the property could be estimated with a reasonable degree of accuracy. The commission has aimed to allow a fair return, including an amount for interest and depreciation estimated according to prescribed rates. It has been necessary, also, for the commission to prescribe a fair rate of return and determine what under normal conditions should be a reasonable rate. The commission finds the rate of return to depend upon the character of the utility, the suitability of its business, local conditions under which the utility operates, the hazards of the enterprise, and the limitations fixed by the terms and spirit of the public-utility law. The rate of interest allowed depends greatly upon the character of the utility, the rate permitted being low for certain concerns, such as water plants, and comparatively high for other investments, which are not so secure. Under normal circumstances, the commission has fixed the following rates, which are intended to include both interest and profits:[2]

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[1] F. L. Holmes, *Regulation of Railroads and Public Utilities in Wisconsin* (D. Appleton & Co., 1915), p. 37; see also Buell *vs.* Chicago, Milwaukee & St. Paul Railway Co., 1 Wisconsin Railway Commission Rep., pp. 478 ff.

[2] F. L. Holmes, *Regulation of Railroads and Public Utilities in Wisconsin* (D. Appleton & Co., 1915), p. 55. The statistician of the Wisconsin commission writes (November 6, 1920) that no material departure has been made in the rates specified above. Owing to the abnormal conditions during the last few years, there has been a tendency to permit rates of return to be increased to 8 per cent.

Railroads about 7 per cent.
Gas works about 7 per cent.
Street railroads about 7.5 per cent.
Water works 6 per cent to 7 per cent.
Electric plants 7.5 per cent to 8 per cent.
Telephone companies 7.5 per cent to 8 per cent.

One of the greatest evils of corporate management is over-capitalization. An illustration of the extent of this evil is thus described by the commission:

On the basis of data in possession of the Railroad Commission it may be stated that the $685,000 par value of bonds held in trust by the Citizens' Saving and Trust Company of Cleveland, Ohio, more than represents the full value of the Madison Street Railway property; and that neither the $450,000 par value of bonds held by the Madison and Interurban Traction Company, nor the $50,000 par value of bonds held by the Southern Wisconsin Traction and Light Company, represent any actual and necessary investment in the present Madison Street Railway system, not to speak of the $815,000 of bonds, par value, authorized to be issued, but not yet issued by the Southern Wisconsin Railway Company. In other words, the authorized bond issue of the Southern Wisconsin Railway Company equals, approximately, five times the cost of reproduction new of the property upon which the bonds rest, while the outstanding stock may be regarded as a superbonus for a promoter. In round numbers the bonded indebtedness at present outstanding amounts to $96,000 per mile; total bonds outstanding and authorized $160,000 per mile; while the cost of reproduction new to-day is less than $31,000 per mile. . . . The capital issues of the Southern Wisconsin Railway Company have been shamefully inflated in the past.[1]

In order to prohibit such practices the commission has provided for regulation of issuances of stocks and bonds in addition to the improvements which are required for safety and convenience.

One of the duties placed upon the commission is the standardization of service. In order to accomplish this the commission has prepared a code applicable to each of the separate utilities. A careful study was made in various

[1] Quoted in F. L. Holmes, *Regulation of Railroads and Public Utilities in Wisconsin* (D. Appleton & Co., 1915), p. 239, from 2 Wisconsin Railway Commission Report, p. 2.

states and cities before the standard of service was determined, to which, as defined at first, it was difficult for companies to adhere. For example, when the gas and electric rates were first announced, few of the companies were able to comply with them without making improvements in order to bring the service up to the standard set by the commission. Regular inspection of plants was provided for by the commission. As a result of this inspection and standardization, improvements were necessary in the service rendered by the utilities of the state.[1]

Another duty placed upon the commission is to require uniform accounting methods for all public utilities. Formerly, owing to the lack of systematic accounting, it was impossible to make comparisons as to the service rendered in the different cities. With uniformity in accounting, it has been relatively easy to discover inefficiency in the service and the undue expenditure of funds.

Perhaps the most decided single step taken by the state in connection with the work of this commission is involved in the enforcement of the indeterminate permit law.[2] The essential features of the indeterminate permit are, first, that it recognizes the monopolistic character of public utilities and prohibits competition until necessity requires the operation of a second utility; and, second, that the right to operate is indeterminate, subject to the consent of the city to purchase the property of the company at any time to be fixed by the commission. This permit assures an absence of competition as long as the company serves the public satisfactorily. Moreover, it renders possible the taking over of the utility at any time if public convenience and necessity seem to require it.

Commissions in other states have not been granted powers as broad as those of the Wisconsin commission, but usually authority has been intrusted to the commissions to require safe and adequate service, to fix a maximum

[1] See F. L. Holmes, *Regulation of Railroads and Public Utilities in Wisconsin* (D. Appleton & Co., 1915), chap. v.

[2] *Ibid.*, chap. xv.

limit for reasonable rates, and to secure full information from corporations as to capitalization, stock issues, and other methods of business management. Despite some serious criticisms and objections to the commission control of utilities, which will be discussed later, the former evils, inequalities, and discriminations have been to a considerable degree eliminated. "Regulation of public utilities is an established institution. It will not be replaced by the restoration of former unlimited freedom of action."[1]

Regulation of Municipal Utilities.—In some respects the most difficult of all problems in the regulation of utilities has arisen in connection with the management and control of municipal utilities. It is in the cities that many of the worst evils of liberal franchises and no regulation have developed. The large municipalities were among the first government units to attempt, by stricter and more explicit franchises, to remove some of the grosser forms of favoritism and corruption. When states began to enter the field of utility regulation, a controversy arose immediately over the relative spheres of state and municipal control. The larger cities, aiming to secure more complete home rule, wished to be free from state regulation entirely. On the other hand, smaller cities, unable to maintain effective regulatory commissions, desired assistance from a state agency. The utility interests first opposed the commission movement; but later, to check radical tendencies in the large cities toward municipal ownership or very strict franchise regulations, utility interests joined with the smaller cities in the movement for a state utility board. With the establishment of state commissions the problem of the relation of these commissions to the large cities has become increasingly difficult.

The functions of a city utility commission may be best defined by describing the functions of a representative commission. The board of utilities of the city of Los Angeles

[1] Carl D. Jackson, "The Trend of Public Utility Regulation," *Public Service*, June, 1920.

was given authority (1) To make at such times as may be prescribed by ordinance an investigation into the affairs of public-utility services and to compel such data as may be necessary to determine charges. (2) To fix rates and compensation, the same to be effective during such periods as may be prescribed by ordinances of the council, but in no event for a period of less than one year or more than three years. (3) To investigate complaints against the service rendered by any company and to recommend to the council proper legislation. (4) To superintend the inspection of the public-utility companies as to their compliance with their franchise grants and as to their treatment of the public generally and to recommend such legislation as may be proper on these questions. (5) To prepare and keep a detailed index record of all public-service franchises that have been granted by the city and to prepare and keep a similar record of all other franchises in the city. (6) To pass upon applications for franchises. (7) To make and enforce, subject to ordinances adopted by the council, rules and regulations respecting the operation of the public utilities in the city. (8) To require the attendance of witnesses and the production of books and papers in any investigation or hearing conducted by it. Commissions with similar powers were established in other large cities.[1]

While a useful purpose can be served by a city commission, many matters are of such a nature as to extend beyond the confines of the city and to require regulation by a more general authority, coming from either the state or the Federal government. For most purposes regulation can be most effectively accomplished through state commissions. The advantages of a state commission for the purpose of general regulation of public utilities are: (1) A state commission can secure from a number of communities data

[1] C. L. King, *The Regulation of Municipal Utilities*, chap. xi, and Charles K. Mohler, "Public Utility Regulation by Los Angeles," *Annals of the American Academy of Political and Social Science* (May, 1914), pp. 108 ff.

sufficient to render intelligent regulation practicable. Because of the extensive relations of municipal utilities it is only through state commissions that adequate information can be secured as a basis for effective regulation. (2) A state commission can require uniformity in regard to issues of stocks and bonds. All of these requirements must be met in any effective system of regulation. (3) A state commission alone can deal with the interurban service. (4) A state commission is in a position to give more adequate protection to the investor and to the public. (5) The state commission alone has plenary powers, acquired, as a rule, from legislation, to regulate rates, services, and extensions for utilities. Without state aid a city would find it difficult indeed to secure information and to provide adequate regulation. The general power and authority of a state commission is indispensable to effective local regulation.[1]

Some Franchise Requirements.—In addition to more effective regulation by utility commissions much stricter terms are exacted in the granting of public-service franchises. The granting of franchises in the past has been done in a rather indiscriminate manner, and the advantages thus gained have often been used to favor unduly utility owners and to ignore the reasonable demands of the public. Experiences of this kind have led to the insistence that certain requirements shall be satisfied in all public-service franchises. These requirements relate to the fixing of fares and rates, to the providing of methods of extensions, to the requiring of proper protection for the public, and to the limiting and supervising of stock issues and publicity of accounts. For the benefit of the general public the rates must be uniform and reasonable; the service must be adequate and must be extended when necessary; the property as well as the service must be kept at a high state of efficiency. In behalf of the company there should be sufficient protection for the capital invested. A further and very

[1] *Cf.* C. L. King, *The Regulation of Municipal Utilities*, chap. xiv, "State *vs.* Municipal Utility Regulation," and pp. 314 ff.

important requirement is that the city retain complete control of the streets, and that it reserve the right to take over the utility at any time or within a reasonable time and operate it under a scheme of public ownership to be administered by the city or by a private corporation under strict terms of public control.

Some of the tendencies and principles involved in the granting of utility franchises may be illustrated by a brief review of the features of a proposed contract between the city council of Houston, Texas, and the Houston Electric Company. In the first place, the company binds itself to make expenditures on its street railway system to the amount of one million dollars. Service is to be rendered on a "service-at-cost" basis, including a fair return to the company's property, the amount of which return is to be fixed by agreement with the city. Charges are to be changed from time to time in conformity to the "service-at-cost" arrangement, and provision is made for the purchase of the property by the city. For this purpose the property value of the company is fixed, and all changes and additions thereto are to be made in consultation and agreement with the board of control established by the city. Eight per cent is fixed as a fair return on the property value for a period of seven years after the ordinance takes effect. If less than a fair return is secured for any one year, this deficiency may be made up from the return of subsequent years. A special incentive is provided for the reduction of fares, and provisions are made in detail for a fare-regulating fund, a replacement reserve, and the special distribution of gross receipts. A board of control is established by the city, whose duty it is to see that the terms of the ordinance are carried out and to exercise in behalf of the city control over the operations of the company.

Conflict Between State and Municipal Utility Regulation.[1]

[1] See D. F. Wilcox, "Defects of State Regulation upon the Ownership Movement," *Annals of the American Academy of Political and Social Science* (May, 1914), p. 71.

—There are, then, two conflicting tendencies in public-utility regulation. The large cities regard the regulation of public utilities as one of the legitimate municipal functions, and there is a distinct tendency in such cities, by means of purchase clauses and amortization provisions in franchises, to prepare the way for the ultimate municipalization of the utilities. This tendency is most marked in the policy concerning street railways.

The other tendency is based upon "the theory that the state as such has no interest in the change from private to public ownership and operation, but, taking utilities as it finds them, should assume control of its rates and service to the exclusion of local authorities. That the legislature, in the absence of specific constitutional guaranties of municipal home rule in respect to this particular matter, has unrestricted authority to exercise the police power, or to delegate its exercise to a state commission, without regard to the public-utility policies which may have been formulated by local authorities and sanctioned by local contracts," has now been established by court decisions in many states, including Wisconsin, Washington, New York, Oklahoma, and Illinois.

The present situation relative to state *vs.* municipal control of utilities, with recommendations to meet a few of the problems involved, is briefly summarized in a report of the Committee on Franchises of the National Municipal League.

Definite Policies Should be Adopted

While we recognize that to a certain extent the policy of cities with respect to their public utilities is a matter for determination according to the particular circumstances of time and place, and while, therefore, we would oppose any attempt on the part of the state to formulate and enforce a mandatory policy with respect to municipal ownership, we are, nevertheless, convinced that the time has come when all constitutional and statutory obstacles that stand in the way of the free development of municipal policy, under limited state administrative supervision, should be removed, and that it no longer satisfies the legitimate demands upon civic statesmanship for the municipal author-

ities to adopt a policy of indefinite postponement with respect to the determination of what the city is ultimately going to do about its public utilities. We believe that the time has come when state laws should be formulated for the purpose of facilitating the determination by municipalities of certain fundamental issues with respect to public utilities, and that whenever a municipality has received the authority to do so, it should proceed to the formulation, declaration, and definite adoption of its policy. It may be that without plan or preparation many or all cities would ultimately be driven into municipal ownership and operation of public utilities, but it is clear that if cities enter upon municipal ownership and operation in this manner they will be most heavily handicapped in the performance of one of the most vital of all municipal functions. The operation of public utilities requires technical knowledge, experience, and skill of a high order. Cities cannot operate public utilities successfully until after they have learned how. No more can they control the operation of public utilities by private corporations until they have learned how. We regard it as in the highest degree incumbent upon cities that have not already done so, immediately to set up the necessary machinery for the development of expert knowledge and skill in the construction, control and operation of these utilities, and we regard the adoption of the policy of exclusive state control as a menace to the integrity of municipal government. We believe that the utilities rendering necessary public service, definitely urban in character, are theoretically and in their very nature primarily a concern of local government, and that any failure on the part of a city to recognize this fact and any action on the part of the state which would prevent a city, after recognizing this fact, from performing its legitimate functions, runs fundamentally counter to the legitimate welfare of the public and to the development of a properly organized and functioning democracy.

Specific Recommendations

Specifically, as to the formulation of municipal policy and as to the co-operation between state and local authorities in the control of public utilities, we make the following recommendations:

1. That every state remove the handicaps from municipal ownership by clearing away legal and financial obstacles, so far as they are now embedded in constitutional and statutory law.

2. That every state provide expert administrative agencies for the regulation and control of public utilities. These agencies should have full jurisdiction over interurban services and over local services where the local authorities are unwilling or unable to exercise local control. They should have limited jurisdiction wherever the local authorities

are in a position to exercise the full normal functions of municipal government, and should even have jurisdiction with respect to accounting and reports in the case of utilities owned and operated by municipalities.

3. That every city where public utilities are operated primarily as local services definitely recognize these services as public functions and set in motion at once the financial machinery necessary to bring about the municipalization of public-utility investments at the earliest practicable moment.

4. That every such city, pending the municipalization of its utilities, recognize the necessity of giving security to public-utility investments and to a fair rate of return thereon, and to that end assume as a municipal burden the ultimate financial risks of public-utility enterprises and insist upon receiving the benefits naturally accruing from this policy in the form of a lowered cost of capital.

5. That every city definitely adopt the policy of securing public-utility service to the consumers either at cost or at fixed rates not in excess of cost with subsidies from taxation whenever needed for the maintenance of the service at the rates fixed.

6. That every large city provide itself with expert administrative agencies for the continuous study of local public-utility problems; for the adjustment of complaints as to service; for the preparation and criticism of public-utility contracts and ordinances; for the formulation of standards of public-utility service; and for adequate representation of itself and its citizens in proceedings before the state commission or other tribunals affecting the capital stock and bond issues, the intercompany agreements, the accounting methods, the reports, the valuations, the rates, and the practices of public service corporations operating in whole or in part within the city's limits.

We believe that the foregoing includes only the essential points in the development of a constructive public-utility policy, and that there is the most urgent need of the definite formulation and adoption, by the several states and cities of the country, of definite programs based upon the principles above outlined.[1]

Results and Difficulties in the Regulation of Utilities by Commissions.—Whether the control of public utilities by commissions is satisfactory is a question upon which opinions greatly vary. That this method has proved better than the policy of no regulation previously tried is

[1] This report was signed by Dr. Delos F. Wilcox, chairman; William M. Leiserman, Horatio M. Pollock, Charles Richardson, and Clinton Rogers Woodruff, Committee on Franchises; *National Municipal Review*, vol. vii (March, 1918), pp. 156–158.

generally conceded by those who have the interests of the public uppermost. That the best results have been obtained is denied especially by those who claim that public ownership is the final solution. Those who favor the commission plan claim that it is only through such an agency that public utilities may be regulated. It is through commissions alone that the necessary information for intelligent and adequate regulation can be secured; that definite inspection and supervision of franchise provisions can be assured; that informal and inexpensive redress for individual grievances can be furnished; and that adequate protection to the investor and to the utility owner can be guaranteed.

Those who are dissatisfied with results claim that utility commissions have not given relief to the public in the way of lower rates and better service. They have shown, it is charged, a strong leaning toward the interests of the utilities as against those of the public, and have placed obstacles in the way of public ownership. Despite these and other criticisms, public regulation has grown steadily, and a close examination of regulative laws shows that they are designed to protect the public and preserve the business welfare of the community.

They are aimed to safeguard the interests of:

(a) The consumer:
Formerly thought to be protected by the ordinary operation of the laws of supply and demand.
(b) The investor:
By demanding that there be a minimum standard of safety and honesty in the issues of securities, and that this standard be determined by the government.
(c) The small producer:
Where there was no regulation the large utilities, by discrimination, rebates, bribery, and other fraudulent methods, forced the small concerns to close.

The chief difficulty in the regulation of utilities is the advantage which big corporations have in dealing with the

commissions. While the advantages are not so great as under the former method of regulation by lawsuit, the favorable position of the utilities in dealing with the commissions has made the friends of the public interests almost despair of the success of this method of control. This difficulty has been well expressed in the language of D. F. Wilcox:

> The principle of state regulation by permanent commissions was put forward in this country a few years ago as a statesmanlike method of protecting the people from the exactions of the public service corporations, while at the same time giving the corporations a fair deal. We now find that all the corporations have been converted to the idea of regulation. They not only welcome it, but insist upon having it. They are so enthusiastic over it that they help write the laws and appoint commissioners.[1]

Regulating commissions have, as in New York, become the tool of partisan machines and of designing politicians. They have at times failed to give the expected relief in the way of lower rates and better service; they have in some instances placed obstacles in the way of public ownership; and, they have occasionally allowed exorbitant rates of interest and profit.

But, despite all of these discouraging failures of commission regulation, the utility commissions have brought about a general improvement of conditions in both rates and service. Then, too, an injured user of a utility now has a recourse in obtaining justice that formerly was denied him. By means of various investigations and the testimony secured, utility commissions have brought to light evils of private ownership that call for stringent control of private ownership or for the more radical step of public ownership and control. Among these evils the most frequent are "excessive charges, enormous profits, watered stock, false accounting, poor service, disregard of safety,

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[1] *Annals of the American Academy of Political and Social Science* (January, 1915), p. 8.

discrimination, fraud, and corruption, defiance of law, treatment of employees, tendency to corrupt politics."[1]

Although public utilities as now regulated by commissions are much more disposed to favor the public than was previously the case, yet in the conflict which is going on between the public on the one side and the private owners of utilities on the other, the odds are most likely to be turned in favor of the corporations. Regulation may safeguard the interests of the public to a certain extent by preventing the extremes in profit making and indifference to the demands for better service and greater comfort. But, holding as they do the upper hand, the corporations are difficult to control, and even the commissions appointed as governmental officials are more or less powerless to give the general public a square deal. Hence experience with utility commissions is leading many to feel that nothing short of public ownership will prove satisfactory. But notwithstanding that to many persons public ownership may be the ultimate goal, complete ownership and control of all utilities is a long way off. Moreover, public ownership may not prove desirable for certain utilities; hence, in the meantime reliable and adequate protection of the public can be secured, if at all, only by some form of utility regulation.

Public Ownership

Advantages of Public Ownership.—There are certain advantages in public ownership which render its general adoption in the management of certain utilities probable in all countries. First, the state or city can secure money at lower rates of interest. Second, there is no incentive to overcapitalization and there is no need of paying high dividends. The service may be rendered at cost or at slightly more than cost in order to bring in a small return in profits

[1] For specific instances, see Stiles P. Jones, "State *versus* Local Regulation of Utilities," *Annals of the American Academy of Political and Social Science* (May, 1914), p. 94, and Carl D. Thompson, *Municipal Ownership* (B. W. Huebsch, 1917).

to the government. There is not the incentive for corruption which exists under private monopoly of public utilities. Every advantage is to be gained by giving good service at low rates. It is thought by some that public ownership is inevitable, for it is claimed that "private ownership of a public utility is fundamentally hostile to and inconsistent with the public welfare." The reason for this appears to be that under private ownership of public utilities the owners are interested primarily in the making of money and only secondarily in the serving of the public. They bend their efforts as far as possible toward the achieving of the former object and vouchsafe to the latter only the necessary minimum of consideration. A conflict naturally arises between the demands of the public and the financial ambitions of the owners of the utility. The conflict has been outlined as follows:[1]

The public wants and must have:	*The corporation wants and must have:*
Low rates;	High fares;
Good service;	Cheap service;
Good labor conditions;	Low labor cost;
Low capitalization so as to justify low rates;	High capitalization so as to justify high rates;
Small profits or none;	Big profits;
Profits go to the public;	Profits go to stockholders;
Diffusion of wealth;	Concentration of wealth;
Franchises and ordinances that protect the public;	Franchises and ordinances that help the corporations;
Public officials who serve the people.	Public officials who serve the corporations.

Public ownership, it is maintained, removes the conflict between the owners and the public because the latter becomes the owner. Under such a policy, the members of a city are working on a co-operative basis for the same end—namely, the best service for the least expenditure of money.[2]

There is, of course, the danger that the public-owned

[1] Carl D. Thompson, *Municipal Ownership* (B. W. Huebsch, 1917), p. 28.
[2] For literature favorable to public ownership, write to the Public Ownership League of America, Chicago, Illinois.

utilities may be mismanaged through the influence of spoils politics. And there are some very discouraging failures on this account. But as the number of utilities in charge of the public increases and the interests involved grow, the necessity of a merit system with appointments and promotions on the basis of efficient service will, it is contended, become the rule in the management of public service companies. Is there any fundamental reason why the public cannot secure the same kind of efficiency in the management of its affairs as the private interests secure? This is a problem which deserves much more thought than it has received thus far.

Public Ownership in European Cities.—The extent to which municipalities may engage with profit in the ownership and regulation of public utilities is best illustrated by some of the leading cities in Europe, where such ownership and regulation have progressed much further than they have in the United States. European cities frequently operate at a small profit water works, electrical and gas plants, and street railways. The water fronts of rivers, canals, lakes, and inland waterways are almost invariably owned by the cities. The profits of these utilities are used toward defraying the expenses of the municipalities and toward lowering the tax rates. It is interesting to compare the lax methods of franchise granting and utility regulation which formerly prevailed in American cities with the method of dealing with utilities in Glasgow, Scotland, where it was decided from 1869 to 1872 that the city would undertake to construct and own its tramway lines. The first lines built by the city were put in operation in 1872. After the lines were completed, the company arranged for a lease of the management of the car service under the following conditions: (1) The leasing corporation was to pay an annual interest charge on the full amount of the city's investment; (2) it was to set aside annually a sinking fund large enough to clear the entire cost of the lines at the expiration of the lease; (3) it was to provide a replacement

fund of 4 per cent per annum on the cost of the lines, out of which they were to be kept in proper condition and restored to the city in perfect order and entirely as good as new in 1894; (4) it was to pay a yearly rental of $750 per street mile. Furthermore, it was provided that in no case should the charges exceed a penny per mile, with special reductions for laboring men in the morning and evening hours. The company that accepted these rather difficult conditions found it impossible to earn much above the expenses of management during the first few years. Within about four years, however, the company prospered and began paying dividends to stockholders. After 1880 the dividends averaged 10 per cent, and a certain proportion was set aside for premiums.[1]

The following public utilities are owned and administered by the corporation of Glasgow: (1) street railways, (2) gas, (3) electric light, (4) water, (5) parks, (6) slaughter houses and markets for meat and vegetables, (7) bath and wash houses, (8) galleries and museums, (9) hospitals, (10) tenements and lodging houses, (11) police and fire departments, (12) drainage and sanitary sewers and sewage-disposal stations, (13) farms on which city sewage is utilized in growing forage crops for livestock, (14) streets and bridges, (15) public welfare bureau.

Municipal ownership is such a success in Glasgow that it is no longer an issue. All candidates for office are committed to municipal ownership. They differ only as to the degree to which they wish the policy to be adopted. The city of Glasgow is the largest property owner within the city limits. The corporation assets totaled in 1913 approximately $123,000,000. The debt on this property was approximately $83,000,000, with a sinking fund of approximately $40,000,000, making an indebtedness of $43,000,000. It is commonly conceded that the municipal utilities furnish better and cheaper service for

[1] Albert Shaw, *Municipal Government in Great Britain* (The Century Company, 1895), chap. iv.

the people than was secured through private operation; at the same time they promote general health and take steps to raise the standard of living among workmen. Not only have the street railways, the water, gas, electric light, and market departments of Glasgow been managed efficiently, but they have been handled in such a way as to bring in a considerable revenue to the city. The present condition of the city of Glasgow revenue shows it to be a going and paying concern providing the necessaries of community life to its citizens more efficiently and cheaply than these were formerly supplied by private enterprises. Beyond this, the city corporation through its municipal lodging and tenement houses is using surplus earnings in an attempt to eliminate slums.[1]

Many of the activities connected with municipal life other than public utilities are publically owned and controlled by the leading cities in Europe. For recreational purposes, cities provide promenades, gardens, and parks. Other enterprises engaged in by certain cities are forests, vineyards, bathing establishments, burial grounds, pawnshops, savings banks (providing particularly for small deposits from the poor), and employment offices for laborers and domestic servants.

In behalf of the public, cities own and operate theaters and opera houses, and contribute to the maintenance of libraries, picture galleries, and zoological gardens. The outlays in support of these activities are regarded as indirect methods of increasing the efficiency of the citizens.

Recently European cities have begun the purchase of land and houses in order to assist in providing satisfactory houses for the poor and to control the development and expansion of the city. This land is usually leased for long terms of years at a low yearly rental. Arrangements are made by which buildings may be erected on the land which the city owns, the city furnishing from 75 to 90 per cent of the money at a low rate of interest. Public slaughter

[1] *American Municipalities*, July, 1913, "Report of Commissioner Putnam."

houses are regarded as a necessity to assure a supply of good meat. At the municipal market place most of the provisions of the household may be secured at moderate prices. Savings banks, pawn shops, and mortgage banks are conducted mostly for use of workingmen.[1]

Public undertakings such as the above in Europe and elsewhere are not always successful. Nor do they, as in some European cities, usually add to the municipal income. Furthermore, the successful management of such enterprises requires a staff of experts specially trained for their work and permanence of tenure as long as efficient service is rendered. The separation of politics and administration which prevails throughout Europe renders it possible to secure and retain experts to manage the public utilities. Where politics and administration are not separated and where offices are filled on a partisan basis for short terms, public ownership is likely to lead to wasteful expenditures and correspondingly poor service. It is a question, then, whether political conditions in the United States are such as to encourage the extension of public ownership. But an analysis of the progress of European cities may aid American citizens in determining the causes for the failure of municipal administration and some remedies which are readily applicable.

Public Ownership of Railroads in Foreign Countries.—The regulation of railroads by the Interstate Commerce Commission, the war-time trial of almost complete public control and regulation, and the Esch-Cummins Act have only tended to accentuate the consideration of the problem of ultimate public ownership of railway systems in the United States. There are in the United States more than 250,000 miles of railways. This mileage is six times greater than that of any other country and comprises almost two-fifths of the entire railway mileage of the world. In view of this great mileage and the immensity of the interests

[1] See Frederic C. Howe, *European Cities at Work* (Charles Scribner's Sons, 1913).

involved, the problem of public ownership is of the greatest significance. It is of special interest in the consideration of this problem to note that more than fifty nations own and operate all railway lines or the larger part thereof. The table given below, based on the best available data, indicates the present status of railway ownership.

MILEAGE OF STATE AND PRIVATE RAILWAYS FOR 1913 BY COUNTRIES [1]

Country	State Owned	Privately Owned	Total	State Owned	Privately Owned
Europe					
Germany	36,597	2,979	39,576	92.5	7.5
Austria-Hungary	23,429	5,260	28,689	81.7	18.3
Great Britain	.....	23,422	23,422	.....	100.0
France	5,606	26,182	31,788	17.6	82.4
European Russia	24,549	14,076	38,625	63.6	36.4
Italy	9,085	1,866	10,951	83.0	17.0
Belgium	2,704	2,770	5,474	49.4	50.6
Luxembourg	122	204	326	37.4	62.6
Netherlands	1,113	909	2,022	55.0	45.0
Switzerland	1,700	1,320	3,020	56.3	43.7
Spain	.....	9,532	9,532	.....	100.0
Portugal	713	1,139	1,852	38.5	61.5
Denmark	1,217	1,125	2,342	52.0	48.0
Norway	1,634	286	1,920	85.1	14.9
Sweden	2,863	6,136	8,999	31.8	68.2
Serbia	634	.....	634	100.0	.....
Roumania	2,204	133	2,337	94.3	5.7
Greece	.....	999	999	.....	100.0
Bulgaria	1,199	.....	1,199	100.0	.....
European Turkey	.....	1,238	1,238	.....	100.0
Islands of Malta, Jersey and Man	.....	68	68	.....	100.0
Total	115,369	99,644	215,013	53.7	46.3
The Americas					
Canada	1,771	27,509	29,280	6.0	94.0
United States	.....	255,180	255,180	.....	100.0
Newfoundland	.....	769	769	.....	100.0
Mexico	12,344	3,487	15,831	78.0	22.0
Central America [2]	359	1,645	2,004	17.9	82.1
Greater Antilles	150	3,254	3,404	4.4	95.6
Lesser Antilles	.....	336	336	.....	100.0
Colombia	110	511	621	17.7	82.3
Venezuela	68	565	633	10.7	89.3
British Guiana	.....	104	104	.....	100.0
Dutch Guiana	.....	37	37	.....	100.0
Ecuador	.....	651	651	.....	100.0
Peru	1,052	666	1,718	61.2	38.8
Bolivia	.....	1,502	1,502	.....	100.0
Brazil	6,723	8,793	15,516	43.3	56.7
Paraguay	.....	232	232	.....	100.0
Uruguay	.....	1,638	1,638	.....	100.0
Chile	1,980	1,976	3,956	50.1	49.9
Argentina	3,488	17,139	20,627	16.9	83.1
Total	28,045	325,994	354,039	7.9	92.1

[1] Archiv für Eisenbahnwesen, 1913, pp. 520–522; reprinted in Carl D. Thompson, "Public Ownership of Railways," *Bulletin No. 12* of Public Ownership League of America, pp. 42–44.
[2] Including Guatemala, Honduras, Salvador, Nicaragua, Costa Rica, and Panama.

Country	State Owned	Privately Owned	Total	State Owned	Privately Owned
Asia					
Asiatic Russia and Siberia	6,799	3,081	9,880	68.8	31.2
China	.....	6,119	6,119	.....	100.0
Japan (including Korea)	4,867	1,955	6,822	71.3	28.7
British East Indies	29,299	5,329	34,628	84.6	15.4
Ceylon	.....	603	603	.....	100.0
Persia	.....	34	34	.....	100.0
Asia Minor	912	2,484	3,396	26.0	73.1
Portuguese Indies	.....	51	51	.....	100.0
Malay States	.....	857	857	.....	100.0
Dutch Indies	1,536	236	1,772	86.7	13.3
Siam	597	105	702	85.0	15.0
Other countries	.....	2,296	2,296	.....	100.0
Total	44,010	23,150	67,160	65.5	34.5
Africa					
Egypt (including Sudan)	2,908	785	3,693	78.7	21.3
Algiers and Tunis	1,802	2,161	3,963	45.5	54.5
Belgian Congo Colonies	.....	863	863	.....	100.0
Union of South Africa:					
Cape Colony	3,429	545	3,974	86.3	13.7
Natal	1,102	.....	1,102	100.0	.....
Central South Africa	3,311	155	3,466	95.5	4.5
Rhodesia	.....	2,405	2,405	.....	100.0
Colonies:					
German	2,593	.....	2,593	100.0	.....
English	1,313	1,041	2,354	55.8	44.2
French	.....	1,998	1,998	.....	100.0
Italian	.....	96	96	.....	100.0
Portuguese	.....	1,009	1,009	.....	100.0
Total	16,458	11,058	27,516	59.8	40.2
Australia					
New Zealand	2,859	29	2,888	99.0	1.0
Victoria	3,645	25	3,670	99.3	0.7
New South Wales	3,928	167	4,095	95.9	4.1
South Australia	2,079	232	2,311	90.0	10.0
Queensland	4,521	294	4,815	93.9	6.1
Tasmania	507	194	701	72.3	27.7
Western Australia	2,852	576	3,428	83.2	16.8
Total	20,391	1,517	21,908	93.1	6.9
Grand Total [1]	224,273	461,363	685,636	32.7	67.3

[1] This table, although the best available, has some inaccuracies. The public owned railways of the United States in Panama and Alaska are not included, and the purchase of the Grand Trunk Pacific system by Canada increases the government railways of that country by more than 15,000 miles.

It will thus be seen that most of the leading countries of the world own and operate their railway systems. England and the United States are the chief exceptions.

The friends of public ownership contend that through public ownership the following improvements have resulted: The conditions of labor have been meliorated; rates have been reduced; the service has been improved; travel and

transportation are safer, with less loss of human lives; the railroads are better financed; great economies have been introduced; and railroads have been taken out of politics.[1]

But the testimony on these counts is far from conclusive. Many of those favoring private ownership see in the public-owned railways a continuous round of failures.[2] And the supporters of private ownership have been continuously presenting their case to the public by means of a systematically organized campaign to "educate the people." It is a noteworthy fact that two of the best railway systems and a large part of the world's mileage are privately owned and managed. Furthermore a few important countries such as Germany and France nationalized the railways as a measure of public defense and not because private ownership was regarded a failure. It is very difficult indeed to secure a fair and unbiased presentation of the cause of public ownership. Many of those who undertake to inform the public are biased on one side or the other. And then the conditions vary so much in the separate countries that comparisons often have relatively little weight. For the citizen the problem is one on which reliable information should be demanded in order that an intelligent and fair-minded judgment may be formed. In this as in numerous other government problems the matters involved are of such a complex character that specialists alone can form really intelligent judgments.

Objections to Public Ownership.[3]—Numerous objections have been advanced by the opponents of the policy of government ownership of public utilities. It is claimed that such a policy is contrary to the fundamental principles of our system of government, and that our political institutions, as they now exist, are not adapted to the manage-

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[1] *Cf.* Carl D. Thompson, "Public Ownership of Railways," *Bulletin No. 12*, Public Ownership League of America, pp. 8 ff.

[2] *Cf.* Yves Guyot, *Where and Why Public Ownership Has Failed* (The Macmillan Company, 1914).

[3] *Cf.* pamphlet by The Merchants' Association of New York, "Opposing Government Ownership and Operation of Public Utilities," November, 1916.

ment of large economic concerns. Moreover, it is maintained that the assuming of the proprietorship of public utilities by the government would mean a great financial loss. Especially would this be the case if the railroads should be taken over and be operated by the national government. Extravagances incident to the management of large business projects by persons holding their positions through political appointment or through popular election have been contrasted with the economical methods used by business experts employed by the heads of large utility corporations.

The basis for these objections, given somewhat in detail, is that the fundamental principles of our system of government require frequent changes, both in the executive and law making bodies. From these periodical changes would follow, after the advent of government ownership utilities, undesirable if not deplorable conditions. It is conceded that frequent changes in the administration of great economic concerns are invariably accompanied by inertia and hesitancy, due to conflicting policies and inexperience and to the critical attitude assumed toward the methods which are in operation at the time of the change in officials. The final outcome of this vacillation is great financial loss. Moreover, the legislature or, in the case of a city, the council or commission, through its power to prescribe by law or ordinance the regulations governing the management of utilities, has an opportunity to place hampering restrictions and limitations upon executives or managers. These restrictions or limitations would prevent prompt action in cases of emergency or in the disposition of important questions of policy which frequently arise in the handling of large economic enterprises.

Another argument advanced against national control of a utility is the evil incident to the sectional demands made upon Congress. Sectional interests have had no inconsiderable influence in bringing about legislation for the benefit of particular localities rather than in the interest of

the country at large. The tendency of Congress to yield to the demands of political expediency and to sectional appeal, it is held, is only too clearly manifested in the policy of Congress toward river and harbor improvements. As a result large appropriations have been made for unrelated projects, to the neglect of any unified and comprehensive plan for a national system of waterways.

In addition to the extravagances already mentioned that, it is believed, would be sure to result from the periodical change in the directing personnel of the service, together with the waste resulting from conflicting policies in management, serious loss and inefficiency would result, likewise, from the failure of the law or ordinance-making bodies to make adequate appropriations for the general up-keep and betterment of the utilities. It is maintained that, as a general rule, when a public utility has been taken over by a local government, there has resulted, through lack of funds and the failure of the public to realize the legitimate needs of efficient management, a deterioration in the service rendered by the utility. Old and inadequate machinery is often kept, in spite of manifest loss both in money and efficiency, because the necessary funds to install new and better machinery are withheld by the city officials, who are supported by the public sentiment, unappreciative of what would constitute an appropriation sufficient for the maintenance of the utility and heedless of the fact that such an appropriation would mean ultimately a cutting down in the present excessive cost of operation. Successful managers of private enterprises adopt the policy not only of keeping abreast of the times in the management of economic enterprises, but also of looking ahead toward the future development of the projects. Governments, owing to their political organization and to the fact that they are backed by a prejudiced or conservative public opinion which is loath to support large expenditures, however necessary, are accused of lagging behind in the installation

of modern machinery and up-to-date methods in the management of public utilities.

Some General Observations and Conclusions as to Utility Problems

The problems, then, which have developed in connection with the ownership and regulation of public utilities are at present unsolved. Though it is generally acknowledged that under existing conditions some form of public control or regulation is desirable, the nature of that control and the proper extent of public regulation remain to be determined.

The utility owners themselves have recognized the need of proper and effective regulation and have become advocates of the policy of regulation by commissions. But the establishment of the commission, the determination of its powers, the relation between state and local commissions, are still in the experimental stage. Judging from the experience of New York, the commission may become the tool of the very interests for the regulation of which it has been established. In fact, it is openly charged that the great public utilities have directed and influenced the appointment of commissioners who were known to favor corporate interests. The few striking instances of this character which have come to light, and the fact that the utilities have become such ardent advocates of utility commissions, have led some of the leaders interested in the public welfare to question the usefulness of state commissions. On the other hand, there are few who would favor the abolition of commissions and a return to the old order. It has not yet been determined how a commission may be constituted and empowered so as to deal fairly by the capitalist and the investor and at the same time attain its main object, namely, the protection of the small user of the utility.

On the other hand, the problem of public ownership looms constantly greater. There has been a steady growth

of sentiment in favor of public ownership, but evidence as to the superiority and effectiveness of such ownership is still inconclusive.

A great deal has been written to demonstrate the superiority of private ownership; but much of this is inspired, if not actually subsidized, by the utilities, who are using this method to do what they call "accelerating public opinion" favorable to private interests. The methods of public accounting are such as to make it extremely difficult to secure data which can be safely used for purposes of comparison. It will be a long time before comparisons may be made which will be sufficiently accurate to form a basis of sound conclusions. It is necessary to remember, however, in making such comparisons, that the aims of the two methods are so fundamentally different that, while it may be hard to figure a gain in dollars and cents from public ownership, other compensations and advantages may more than balance what at first seem a financial loss and a decrease in efficiency. In fact, each may be judged by a different standard and may be found superior in its own sphere. The modern problems are: How may public-owned utilities be made more efficient? And, How far is it advisable for the state to go in extending public ownership?

In discussing the problems incident to the owning and regulation of public utilities, the National Civic Federation's Commission of Public Ownership and Operation has reached conclusions of unusual interest. The commission was appointed in 1905, and was composed of representatives from both sides of the question. After having studied the problem carefully both in the United States and in Europe, the committee reached the following conclusions:

Public utilities, whether in public or private hands, are best conducted under a system of legalized and regulated monopoly.

Public utilities in which the sanitary motive largely enters should be operated by the public.

The success of municipal operation of public utilities de-

pends upon the existence in the city of a high capacity for municipal government.

As to the question of the general expediency of either private or public ownership the committee took no positive position. It felt that the question must be solved by each municipality in the light of local conditions. Where private companies are serving the public satisfactorily, little or nothing may be gained through experimenting with municipal ownership. The government of one city may be adapted to and capable of the management of public utilities, while that of another city may fail in the undertaking. After making its investigations the committee concluded that no municipal operation is likely to be highly successful that does not provide for

1. An executive manager with full responsibility, holding his position during good behavior.
2. The exclusion of political influence and personal favoritism from the management of the undertaking.
3. The separation of the finances of the undertaking from the rest of the city finances.
4. The exemption from the debt limit of the necessary bond issues for revenue-producing utilities, which bond issues shall be a first charge upon the property and revenues of such undertaking.

The committee saw no reason why the financial results from private operation should be different from those of public operation, provided the conditions were the same. Municipal ownership of public utilities, in the opinion of the committee, should not be extended to revenue-producing industries which do not "involve the public health, the public safety, public transportation, or the permanent occupation of public streets or grounds, and that municipal operation should not be undertaken solely for profit." Grants to private companies for the construction and operation of public utilities should be terminable after a certain fixed period, and the right should be retained by cities meanwhile to purchase the property, at a fair value, for operation, lease, or sale. The committee, furthermore, rec-

ommended that "the various states should give to their municipalities the authority, upon popular vote under reasonable regulation, to build and operate public utilities, or to build and lease the same, or to take over works already constructed." The effect of such authority, the committee believed, would be that public-utility companies would be more inclined to furnish adequate service upon fair terms and would thus make it unnecessary for the public either to take over existing utilities or to acquire new ones. In addition, it was recommended that private companies operating public utilities should be subject to public regulation and examination by a competent public authority, who should have the power to require of all public utilities both uniformity in the system of records and accounts and full publicity of all data relative thereto.

A more recent statement as to the advisability of municipal ownership, viewed from the standpoint of city officials, is that made by the Conference of American Mayors at Philadelphia in 1914. This body unanimously recommended that "no general conclusion be formulated upon the abstract question of municipal ownership," but urged "that municipalities should be given, in all instances, the power to municipalize public utilities, the expediency of its exercise being at any time and place, and with regard to any particular utility, a matter for local determination."

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CHAPTER III

PROBLEMS OF INTERNATIONAL RELATIONS AND WORLD POLITICS

The United States and International Affairs

The range and magnitude of the problems arising from the relation of the United States to other countries can be suggested in no better way than by reference to the notable words of one of the greatest authorities on international law, John Bassett Moore. He prefaces a very interesting discussion of American diplomacy as follows:

> Nothing could be more erroneous than the supposition that the United States has, as a result of certain changes in its habit, suddenly become, within the past few years, a world power. The United States has in reality always been in the strongest and highest sense a world power. The record of its achievements in the promulgation of humane doctrines is one in which no American need hesitate to own a patriotic pride.[1]

The Beginning of Foreign Relations.—From the inception of the United States as a separate government and an independent state it has been the policy of the nation to establish and foster relations with foreign countries. The Declaration of Independence and the advocacy of the theories and policies involved marked the beginning of an era in the development of international relations.

> Of this theory and policy the keynote was freedom: freedom of the individual, in order that he might work out his destiny in his own way; freedom in government, in order that the human faculties might have free course; freedom in commerce, in order that the resources of the

[1] John Bassett Moore, *American Diplomacy* (Harper & Brothers, 1905), Prefatory note.

earth might be developed and rendered fruitful in the increase of human wealth, contentment and happiness.[1]

Soon after the formulation of these principles in the Declaration of Independence an effort was made to enter into diplomatic relations with other powers. For this purpose a "Committee of Secret Correspondence" was appointed by the Continental Congress, and agents were at once sent to negotiate with certain European nations which were thought to be friendly to the American cause. On February 6, 1778, the advent of the United States into the family of nations was signalized by the signing of two treaties, one of commerce and one of alliance. It is significant that in the latter of these treaties the United States, in return for aid from France in the establishing of independence, agreed that, in the event of war between France and Great Britain, the United States would aid France in every way, including military assistance if necessary. It was this alliance which brought France to the support of the United States with money, munitions of warfare, and military and naval forces. The success of the American Revolution was hastened, if not, indeed, made possible, by the aid thus secured from France. The career of the United States was begun through the medium of a very important "entangling alliance" with one of the foremost powers of the world. Diplomatic representatives were dispatched to other European countries, but only one other treaty was signed prior to the treaty of peace—namely, one of amity and commerce with the Netherlands. The period immediately following the Treaty of Paris in 1776 and closing with the adoption of the Constitution in 1789 was one of more extended and successful negotiations with foreign countries. Within this time fourteen treaties had been entered into by the United States: six with France, three with Great Britain, two with the Netherlands, one each with Switzerland, Prussia, and Morocco. The atti-

[1] John Bassett Moore, *American Diplomacy* (Harper & Brothers, 1905), p. 2.

tude toward foreign relations maintained during this period, says Professor Fish,

> . . . was recognized by the intelligent to be as essential to the establishment of our national existence as arms; diplomats were as carefully chosen as generals; the news of the negotiations of Franklin, Adams, and Jay was as anxiously awaited as that from the army, and their success brought almost as great a reward of popular acclaim as did those of commanders in the field.[1]

The Development of Principles and Policies in the Conduct of Foreign Relations

The Isolation Policy.—The signing of the treaty of peace at Paris, when the United States commissioners broke faith with France as the ally of the United States and entered into separate negotiations with Great Britain, was regarded as a diplomatic triumph. It was the beginning of a somewhat selfish policy, which was later formulated into the noted American "isolation theory." When in the course of the French Revolution France became involved in a general European war, she called upon the United States to fulfill the terms of the treaty of alliance of 1778 and to come to the aid of the French cause. American opinion was greatly divided. Washington submitted the question to his chief advisers in the Cabinet, Hamilton and Jefferson. Hamilton contended that the changes in the government of France and other changes in conditions since the treaty of 1778 was signed released the United States from any obligation to aid France. Jefferson, on the other hand, regarded the treaty of 1778 as in full force and effect, and advised that it was the duty of the United States to furnish aid to France. Washington, regarding the treaty as purely defensive in character, followed the advice of Hamilton, and in his neutrality proclamation announced a policy which later became known as the isolation policy. In his proclamation Washington declared it as the intention

[1] C. R. Fish, *American Diplomacy* (Henry Holt & Co., 1915), p. 1.

of the United States to remain "friendly and impartial toward the belligerents." Citizens were warned to remain neutral and not to trade with the warring powers in articles which in the usage of international law were regarded as contraband. The Genêt incident and the retirement of Jefferson from the Cabinet rendered difficult the enforcement of the neutrality proclamation. Finally, in 1794, Congress came to the support of the President with the enactment of the first neutrality law. This act made liable to a fine and imprisonment all persons entering the service of a foreign state, and also prescribed penalties for fitting out or augmenting the equipment of any foreign ship within the territorial waters of the United States.

The policy of isolation first announced in Washington's neutrality proclamation was later put into definite language in his farewell address, in which he stated that

> . . . the greatest rule of conduct for us in regard to foreign nations is, in extending our commercial relations, to have with them as little political connection as possible. So far as we have already formed engagements, let them be fulfilled with perfect good faith. Here let us stop.

During the formative period of our nation, interests which were of primary importance to Europe were of very little concern to us. Naturally, Europe, from time to time, would be engaged in controversies the causes of which would be essentially foreign to our interests. It would have been inexpedient, therefore, for us to assume obligations which would involve us in the changing policies of European nations, in their friendly combinations, and in their disruptions among themselves. It appeared to Washington that the best policy was "to steer clear of permanent alliances with any portion of the foreign world."

Jefferson, too, expressed this idea in his first inaugural address in these terms: "Peace, commerce, and honest friendship with all nations, entangling alliances with none." It became the conviction of our first Presidents and those

in charge of our foreign affairs that the United States ought to keep out of the contests of European nations. Nevertheless, although this policy announced by our early statesmen has throughout influenced the international affairs of the United States, and has generally served to keep our foreign relations free from foreign entanglements,[1] the connection between the American government and foreign nations has become steadily closer.

At the same time that the United States entered upon her policy of "entangling alliances with none," she sought to safeguard her commercial interests. So far as commercial interests are concerned, the United States has been a world power from the beginning of her history as a nation. The treaty of 1778 with France secured to the United States certain commercial privileges. In 1803, in the affair with Tripoli, a difficulty arising from the Pasha's demand for tribute, the United States government sent armed cruisers to the Mediterranean and conducted a short but effective war, which brought speedy peace between this country and the Barbary States. In 1815 Congress passed an act to protect American commerce against Algerian cruisers, and another squadron soon secured a treaty stipulating that no further tribute should be demanded from the United States. The United States in 1843 sought to obtain from China commercial privileges and advantages similar to those which China had granted to Great Britain, and a little later, in 1854, the United States demanded of Japan "those acts of courtesy which are due from one civilized nation to another." The same attitude was maintained with regard to the Hawaiian Islands and Cuba. Thus the United States, while professing to avoid political alliances, has, from the beginning, protected her commercial interests. It was the fear of entering political alliances and the desire

[1] For three quarters of a century after Monroe's declaration the policy of isolation was more rigidly adhered to than ever, the principal departure from it being the signature and ratification of the Clayton-Bulwer Treaty in 1850. J. H. Latané, *From Isolation to Leadership* (Doubleday, Page & Co., 1919), p. 44.

to protect American commerce that resulted in the well-known neutrality policy of the United States.

Neutrality Policy.—When the machinery of our government was actually put into operation in 1789 and the country was forced to decide the question as to the part we should take in the conflicts between European governments, it was thought necessary and expedient to avoid, as Washington expressed it, "entangling alliances." Hence, the United States took the position of reserving the right to protect its sovereignty, to refuse permission to arm vessels and raise men to assist foreign countries, and to assure a condition of neutrality. Thus, in her foreign relations the United States adopted in the early years of her history a policy of neutrality which is said to have been "identical with the standard of conduct adopted by the community of nations."[1] It was the Dutch or continental view rather than the English view that was adopted in the first American commercial treaties. The United States and the continental European countries made common cause against England because of her control of the sea. By these treaties the belligerent right of search was definitely limited, contraband was narrowly interpreted, and neutral ships were to be permitted to carry enemy goods.

The United States not only laid down certain principles of neutrality, but protested against infringement upon neutral rights, met instances of interference with embargoes and non-intercourse acts, and finally, in the case of Great Britain, went to war. Says Professor Hall:

> . . . the policy of the United States in 1793 constitutes an epoch in the development of the usages of neutrality; . . . it represented by far the most advanced existing opinions as to what these obligations [incumbent upon neutrals] were; and in some points it even went farther than authoritative international custom has up to the present time advanced.[2]

The principle of the maintenance of neutral rights was put to the test in the controversies between the United

[1] W. E. Hall, *International Law* (Fifth Edition), (Oxford Press, 1904), p. 503.

[2] *Ibid.*, p. 503.

States and the bandits of Tripoli, in which it was declared by Jefferson to be the doctrine of the United States "to prefer war in all cases to tribute under any form. Not to stoop to dishonorable condescension for the protection of our rights to navigate the ocean freely." In applying this principle the United States insisted on the impossibility of allowing the right of search of American vessels, and the position of the United States was eventually accepted by England and other European countries. The recent declaration of war by the Congress and President of the United States to support the freedom of commerce is directly in line with the principles maintained and supported by the leaders in international affairs in the history of American diplomacy.

On the importance of the contribution of the United States in this line Professor Moore writes:

> The principle of the freedom of the seas has lost neither its vitality nor its importance. It may indeed be said that the exemption of vessels from visitation and search on the high seas in time of peace is a principle which grows rather than diminishes in the estimation of mankind; for in the light of history its establishment is seen to mark the progress of commerce from a semibarbarous condition, in which it was exposed to constant violence, to its present state of freedom and security. Nor is there any page in American history more glorious than that on which the successful advocacy of this great principle is recorded.[1]

The questions as to what is meant by the freedom of the seas and how far such freedom may be curtailed in time of war have been raised anew. The Great War has rendered necessary a re-definition of the term. Not only has the freedom of the seas been one of the fundamental principles of American diplomacy, but the United States has also given its encouragement and support to the effort to liberate commerce from the restrictions that confined it under the system of colonial and national monopolies prevailing at the beginning of the nineteenth century. The principle for which the United States has stood was first

[1] John Bassett Moore, *American Diplomacy* (Harper & Brothers, 1905) p. 81.

presented in the treaty of commerce with France of 1788, where it was declared that the rules which govern commerce

> . . . could not be better obtained than by taking for the basis of their agreement the most perfect equality and reciprocity, and by carefully avoiding all those burthensome preferences which are usually sources of debate, embarrassment, and discontent; by leaving also, each party at liberty to make, respecting commerce and navigation, those regulations which it should find most convenient to itself; and by avoiding the disadvantages of commerce solely upon reciprocal utility and the just rules of free intercourse.

This principle was consistently upheld in subsequent treaties, was extended, and finally resulted in the act of March 24, 1828, by which the arrangements were made for the reciprocal abolition of all discriminating duties without regard to the origin of the cargo or the port from which the vessel came. This principle has been extended to practically all countries, and has been confirmed by subsequent treaties. Furthermore, American diplomacy has brought about the announcement of a new policy in the far East. This policy was stated by Mr. Hay as follows:

> To seek isolation which may bring about permanent safety and peace to China, preserve China's territorial and administrative entity, protect all the rights granted to friendly powers by treaties and international law and safeguard for the world the principle of equal and impartial trade with all parts of the Chinese Empire.

Similarly, the United States has stood for an "open door" in the trade with the Philippines. It has, also, from the very beginning stood for freedom from governmental interference with religious opinions, and has adhered to this policy throughout its diplomatic relations with foreign countries.

Monroe Doctrine.—By far the most important principle and policy of the diplomacy of the United States is the Monroe Doctrine. This doctrine, conceived as an outgrowth of the American policy of isolation and non-interference in European affairs, has led to results not compatible with the theory of isolation. Shortly after the war

of 1812, when the position of the United States as an independent nation was assured, the American colonies of Spain rose in revolt and severed their connections with the mother country. These revolutions were the culmination of a series of uprisings which to the monarchs and conservative leaders of Europe represented a continuation of the earlier revolutionary movements in America and in France. To offset what appeared to European monarchs to be a general movement toward insurrection and revolt the Holy Alliance was formed in 1815, composed of the monarchs of Russia, Austria, and Prussia, for the purpose of defending religion, morality, and government by divine right.[1] While the Alliance accomplished little, certain conferences resulted which boded ill for the friends of representative government. At one of these, the Congress of Verona, where arrangements were made for the restoration of the Spanish monarchy, it was resolved "that the system of representative government is equally incompatible with the monarchical principles as the maxim of sovereignty of the people is with the divine right"; and the nations were urged to use all their efforts to put an end to the system of representative government "in whatsoever country it may exist in Europe, and to prevent its being introduced in those countries where it is not yet known."[2] Much interest was manifested in the United States in the incipient revolutionary movements of South America; but in view of the fact that our government was in the process of completing negotiations with Spain for the cession of Florida, it was necessary to give at least the appearance of neutrality. As soon as the Florida treaty was consummated the President recommended the recognition of the new governments. Meanwhile England had begun to realize the benefits of Spanish-American trade, and under the leadership of Canning a policy was formulated to the effect that England and America should join

[1] See J. H. Latané, *From Isolation to Leadership*, pp. 20 ff.
[2] *Cf.* C. R. Fish, *American Diplomacy*, p. 204.

in an expression of disapproval of the proposed interference of European nations in the affairs of Spanish America. This view, having been communicated to the Secretary of State, Adams, led to a long Cabinet discussion, which resulted in a refusal to co-operate with England, because such co-operation was regarded as contrary to the policy of isolation, and in the announcement of the Monroe Doctrine.[1]

The fundamental principle of the policy as at first formulated was that the American continents are henceforth not to be considered as subject to future colonization by any European power. This policy was stated in the following language of President Monroe:

> We owe it, therefore, to candor, and to the amicable relations existing between the United States and those powers to declare that we should consider any attempt on their part to extend their system to any portion of this hemisphere as dangerous to our peace and safety. With the existing colonies or dependencies of any European power we have not interfered and shall not interfere. But with the governments who have declared their independence and maintained it and whose independence we have, on good consideration and on just principles, acknowledged, we could not view any interference for the purpose of oppressing them or of controlling in any other manner their destiny, by any European power in any other light than as a manifestation of an unfriendly disposition toward the United States.

Second, the principle of the two spheres was clearly stated to the effect that with regard to Europe it would be the policy of the United States not to interfere but to cultivate friendly relations with all governments. On the other hand, the United States would view as unwise any attempt at interference by European powers on this continent.

It is generally conceded that the boldness of the language in this message was in part occasioned by the assurance that the British navy was ready to support the doctrine announced. But Canning, annoyed at the refusal to co-operate

[1] President Monroe, with whom Jefferson and Madison concurred, appeared to favor an alliance with Great Britain. Secretary of State Adams held out for independent action on the part of the United States, and he finally succeeded in winning the President to this view. Latané, *From Isolation to Leadership* (Doubleday, Page & Co., 1919), pp. 25 ff.

in the protection of South America from Spain and her allies, set himself to offset the influence of the United States in Spanish America by securing commercial and diplomatic privileges which in the long run gave the advantage to England. The plan of Adams to secure the leadership of the United States in Latin-American affairs was temporarily thwarted, but certain important gains resulted from President Monroe's message, which are thus summarized by Professor Fish:

> The plan for a United States hegemony of the American continent, therefore, fell before the greater resources of England, and because of our divided policies. England continued until the present generation to enjoy commercial predominance and a certain political leadership. Those policies, however, to which Monroe's message was confined—the separation of the American and European spheres of influence, and the closing of the era of colonization—were grounded on facts, permanent interests, and the waxing strength of the United States. Although not incorporated in law, either national or international, they have stood. Europe has actually respected the territorial integrity and political independence of the Americas, and our people have until to-day embraced as one of their most cherished ideals the statement of Monroe's policy, founded as it was on their fundamental desire to pursue untrammeled the course of their own development and to hold Europe at ocean's length. Possibly its association with the venerable and non-contentious figure of Monroe gave it quicker and more general hold on the public mind than if it had taken its name from its real author, the belligerent Adams. From time to time the mantle of the Monroe Doctrine has been spread over additions and interpretations, till the name now stands for much that was not imagined at its announcement. It is possible that, by tending to crystallize our ideas, it has in the long run hampered our adjustment to conditions; for national interests are only relatively permanent, and their relationship with one another changes constantly. There can be no doubt, however, of the advantage that it was to us, in the period of untutored democracy upon which we were just entering, to have out a sheet anchor of fixed and respected policy.[1]

The Relation of the United States to International Arbitration and International Law

International Arbitration.—Another phase of foreign affairs in which the United States has played a prominent

[1] C. R. Fish, *American Diplomacy*, pp. 217–218.

rôle is that of the development of mediation and arbitration. Mediation is an advisory process, in which recommendations are made and considered by the contending parties. Arbitration is a semijudicial process, in which matters of international controversy are placed before some tribunal that acts in part, at least, according to judicial regulations and procedure. Mediation may be a very important auxiliary to arbitration. But mediation acts through the forms and agencies of diplomacy; arbitration, through those of a court of justice or of a judicial body.

The United States has always taken an active part in the use of arbitration for the settlement of international difficulties. As early as the Jay treaty, arrangements were made for the arbitration of an eastern boundary question. The commission that was appointed to decide upon the eastern boundary of the United States rendered its report in 1798, and this arbitral award was the first to which the United States was a party. Several difficult questions have been determined by arbitration between the United States and France, between the United States and England, as well as between this government and the Central and South American governments. The total number of cases of arbitration participated in by the United States down to 1900 was fifty-seven, in twenty of which the other party was Great Britain.

The United States has not only favored the settlement of its own affairs by arbitration, but as early as 1881 the government issued a call to the countries of North and South America to consider the advisability of discussing methods of preventing war between nations. Nothing was accomplished directly by the call, but as a result of the International American Conference of 1889–90, which grew out of this action, a very important plan of arbitration was adopted in March, 1890, to the effect

> . . . that arbitration should be obligatory on all controversies concerning diplomatic and consular privileges, boundaries, territories, navigation, and the validity of indemnities, right of construction, and

enforcement of treaties; and that it should be equally obligatory in all other cases, whatever might be their origin, nature, or object, with the sole exception of those involving a controversy which might imperil national independence, but that even in this case, while arbitration for that nation should be optional, it should be obligatory upon the adversary power.

Though this plan failed of adoption, it represented the proposal of a large number of the Central and South American states.

Hague Conferences and Recent Arbitration Treaties.—The first Hague conference, which met in 1899, was the initial instance in which the United States participated in a general congress of European powers. By some this action of the United States was regarded as a marked departure from previous practice. In order to meet criticisms and to indicate the intention not to cast aside traditional policies the American delegation was instructed to sign the final treaty with the reservation:

Nothing contained in this convention shall be so construed as to require the United States to depart from its traditional policy of not intruding upon, interfering with, or entangling itself in the political questions or policy or internal administration of any foreign state; nor shall anything contained in the said convention be construed to imply a relinquishment by the United States of America of its traditional attitude toward purely American questions.

At this conference a convention was adopted arranging for the pacific settlement of international disputes, another for the regulating and humanizing of the laws and customs of land warfare, and another for the adaptation to maritime warfare of the principles of the Geneva Convention of 1864.

Under the convention for the pacific settlement of international disputes, the Dogger Bank affair between Great Britain and Russia was settled; the machinery for the conclusion of the Russo-Japanese war was put into operation, and a court of arbitration established which tried several important cases.[1]

[1] Charles H. Stockton, *Outlines of International Law* (Charles Scribner's Sons, 1914), pp. 53–54.

Delegates from the United States participated in the second Hague conference. At this conference thirteen conventions were adopted as follows:

1. A revised convention for the pacific settlement of international disputes.
2. A convention respecting the employment of force for the recovery of contract debts.
3. A convention relative to the opening of hostilities.
4. A revised convention regarding the laws and customs of land warfare.
5. A convention relating to the rights and duties of neutral powers and persons in case of war on land.
6. A convention regarding the status of enemy merchant ships at the outbreak of hostilities.
7. A convention in regard to the conversion of merchant ships into warships.
8. A convention as to the laying of submarine mines.
9. A convention regarding bombardments by naval forces in time of war.
10. A convention for the adaptation to maritime war of the principles of the Geneva convention.
11. A convention relative to certain restrictions with regard to the exercise of the right of capture in naval war.
12. A convention relative to the creation of an international prize-court.
13. A convention concerning the rights and duties of neutral powers in naval war.[1]

At the second Hague conference a resolution was adopted providing for a permanent court of arbitration, with an office and staff, and making provisions for the settlement of questions arising before the court. The features of this organization are: first, a panel of judges comprised of persons versed in questions of international law, not more than four of whom are to be chosen by each contracting state; second, a permanent administrative council, comprised of the diplomatic representatives of the contracting powers, whose duty it is to settle rules of pro-

[1] These conventions may be found in a volume on *The Texts of the Hague Conferences*, by J. B. Scott, issued by the Oxford Press, and in a series of pamphlets published by the Carnegie Endowment for International Peace, Washington, D. C., 1915.

cedure and attend to necessary matters of administration; third, an international bureau to serve as a registry for the court. Reference of cases to the court is voluntary; but a number of international controversies have been successfully disposed of by this tribunal, including a claim of the United States against Mexico, known as the Pious Fund Cases.

Furthermore, the United States has proposed certain treaties for the establishment of arbitration in the broadest possible scope; that is, they were intended to cover all controversies by the application of the principles of law or equity. Originally negotiated by President Taft, they were rejected by the Senate, but were taken up subsequently in pursuance of a plan defined and presented by President Wilson and Secretary of State Bryan. As part of the new agreement it was provided that before declaring war or engaging in hostilities the nations concerned should submit the question in controversy to the Hague Court, or some other international tribunal, for investigation and report, each party reserving the right to act independently afterward. A further step was taken in a peace proposal presented by President Wilson, to the effect that

> . . . the parties agree that all questions of whatever character and nature in dispute between them shall, when diplomatic efforts fail, be submitted for investigation and report to an international commission (the composition to be agreed upon); and the contracting parties agree not to declare war or begin hostilities until such an investigation is made and reports submitted.

All of these treaties were followed by certain others embodying a more comprehensive plan of conciliation and arbitration for the settlement of questions between the United States and foreign powers. In the treaties of this latter class, it is stipulated that

> . . . the high contracting parties agree that all disputes between them of every nature whatsoever, which diplomacy fails to adjust, shall be submitted to investigation and report to an international commission,

and they agree not to declare war or hostilities during such investigation or report.

Provision is made for an International Commission of five members, one member to be chosen from each country by the government thereof, to which all controversies which cannot be settled by diplomacy will be referred. The United States now has treaties and commissions for the advancement of peace under the above-mentioned plan with the following nations; Bolivia, Brazil, Chile, Costa Rica, Denmark, Ecuador, France, Great Britain, Guatemala, Honduras, Italy, Norway, Paraguay, Peru, Portugal, Russia, Spain, Sweden, and Uruguay. Other nations which have agreed to the treaties in part are the Netherlands, Prussia, Switzerland, and Venezuela.[1]

A plan to establish a method of arbitration among all the leading powers of the world is incorporated as a feature of the Covenant for a League of Nations in Articles 12 and 13, and is as follows:

Disputes to be Submitted to Arbitration or Inquiry.—The Members of the League agree that, if there should arise between them any dispute likely to lead to a rupture, they will submit the matter either to arbitration or to inquiry by the Council, and they agree in no case to resort to war until three months after the award by the arbitrators or the report by the Council.

In any case under this Article the award of the arbitrators shall be made within a reasonable time, and the report of the Council shall be made within six months after the submission of the dispute.

Arbitration of Disputes.—The Members of the League agree that, whenever any dispute shall arise between them which they recognize to be suitable for submission to arbitration and which cannot be satisfactorily settled by diplomacy, they will submit the whole subject matter to arbitration.

Disputes as to the interpretation of a treaty, as to any question of international law, as to the existence of any fact which, if established, would constitute a breach of any international obligation, or as to the extent and nature of the reparation to be made for any such breach, are declared to be among those which are generally suitable for submission to arbitration.

[1] For a full list of these treaties with the conditions applied to each, consult vol. vi, no. v, of the pamphlet series of the World Peace Foundation.

For the consideration of any such dispute the court of arbitration to which the case is referred shall be the court agreed on by the parties to the dispute or stipulated in any convention existing between them.

The Members of the League agree that they will carry out in full good faith any award that may be rendered and that they will not resort to war against a Member of the League which complies therewith. In the event of any failure to carry out such an award, the Council shall propose what steps should be taken to give effect thereto.

Whether the United States will become a party to the covenant or to some other form of international union, and whether the method of arbitration for the settlement of international difficulties will be extended, remain as yet to be determined.

Relation to International Law.—The United States has from the beginning recognized international law as part of the law of the United States. As early as 1796 Justice Wilson said that "when the United States declared their independence they were bound to receive the law of nations in its modern state of purity and refinement."[1] The Federal Constitution gave to Congress authority to define and punish offenses committed against the law of nations. After the Constitution went into effect, it was decided by the Supreme Court, speaking through Chief - Justice Marshall and Justice Story, that in the absence of an act of Congress to the contrary "the court is bound by the law of nations which is a part of the law of the land."[2] This view has always been followed by American courts, the prevailing opinion being stated clearly by Justice Gray:

International law is part of our law and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who, by years of

[1] Ware *vs.* Hylton, 3 Dallas 199, 281.

[2] The Nereide (1815), 9 Cranch, 388, 423; United States *vs.* Smith, 5 Wheaton 153.

labor, research, and experience, have made themselves peculiarly well acquainted with the subjects of which they treat.[1]

The statesmen and jurists of the United States, then, have regarded the acceptance of the rules of international law as a part of the condition on which a state is originally received into the family of nations. But, on the one hand, they have not placed as narrow an interpretation upon the application of the rules of international law as have frequently the courts of England,[2] nor, on the other hand, have they been disposed to follow the courts of some other nations in a contemptuous disregard of the law of nations.

To develop further and to render more effective the rules of international law the United States has participated actively in the formation of a Permanent Court of International Justice which is taking definite form under the guidance of the Council of the League of Nations.[3]

The United States and Latin America

The proximity of the United States to the South and Central-American countries has given a peculiar significance to the diplomatic relations existing between this country and Latin America. By the Monroe Doctrine European powers are debarred from territorial aggrandizement on the American continent. But the relations of the United States to Latin America have not been confined to the negative policy of protection from European territorial designs, for almost continuously efforts have been made to secure co-operation among the states of the Western Hemisphere and to foster common commercial interests. This desire to co-operate was shown, on the one hand, in the adoption by numerous South-American states of constitutional governments modeled, in large part, upon

[1] The Paquette Habana, 175 U. S. 677.

[2] See West Rand Central Gold Mining Co. *vs.* Rex (1905), 2 K. B. 391.

[3] Draft Scheme for a "Permanent Court of International Justice," League of Nations, vol. iii, September, 1920.

that of the United States and, on the other hand, it was evidenced by the United States committing herself to a recognition of the new republics as free and independent states.

Unfortunately, though the new states provided themselves with written constitutions, diplomatic service, and the ordinary appurtenances of free and independent societies, it was soon found that these instrumentalities of free government were not sufficient to provide stable political organizations in the South-American countries. Though the new republics had a fine opportunity to develop permanent governments, a condition of confusion and anarchy developed during the years from 1827 to 1844, when little progress was made. In most of the countries there was a rapid succession of civil wars and changes of government. The governments fell into the hands of dictators who plotted, revolted, and murdered, wielding authority mostly on the basis of military usurpation.

As a result of this lack of stability in their governments the Latin-American countries were, as a rule, unable to afford protection to the lives and property of foreign residents. Many nations were obliged to spend most of their diplomatic energy in the adjustment of claims against Latin-American powers for injury to their citizens. Temporary governments assumed obligations for which their successors refused to accept responsibility. After 1840 it seemed that

> . . . the efforts to secure good government became almost hopeless in most of the states. Strong and patriotic men came into public life and occasionally to the highest offices, but dictators multiplied, commerce was impeded, and wars impoverished many parts of the Americas. The world came to expect misrule and indifference to national obligations.[1]

This condition continued to prevail in most of the Latin-American countries, but in the period from 1844 to 1880 a few of these nations began to emerge from a condition

[1] A. B. Hart, *The Monroe Doctrine* (Little, Brown & Co., 1916), p. 104.

of confusion and anarchy and to establish more or less permanent governments. Notable among these were Argentine, Chile, and Brazil. The Argentine Republic, centering around Buenos Ayres, was the most orderly of all of the Latin-American countries, but Chile soon followed with the establishment of a strong government. It was not until the latter part of the nineteenth century that Brazil emerged from the chaotic political conditions which obtained during the greater part of the century. These three powers have taken the lead in the development of co-operative relations between the Latin-American countries and the United States.

Pan-American Congresses.—The attitude of the United States toward South America was at first influenced largely by political interests and motives. But the American government soon became interested in the countries to the south for commercial reasons. With the growth of manufactures and commerce, the commercial motive became dominant, and one of the first results was the arrangement for reciprocity with Latin-American countries in order to secure their trade and to afford to the United States greater opportunities for commercial development in these countries. Although the reciprocity treaties, in the main, were a failure, to them may be traced the beginning of a broader and more general interest and a realization of the need of greater unity and co-operation between the United States and Latin America. An early result was the inauguration of a series of Pan-American Congresses.

This movement toward co-operation extends as far back as 1825, when certain Spanish-American powers issued an invitation to a congress to be held in Panama. The United States delayed the appointment of delegates; and although representatives were finally chosen, they did not reach Panama in time to participate in the conference, which gave most of its attention to the freeing of Cuba and Porto Rico from Spanish rule.

This idea of co-operation through conferences or congresses, after lapsing for a long time, was revived by Secretary of State Blaine in 1881. The calling of the conference, however, was delayed on account of the war between Chile and Peru. One of the policies for which Blaine became sponsor was that the United States should become the mediator in disputes arising between Latin American powers. For the purpose of developing this scheme of arbitration in which the United States was to act as umpire, and of considering other matters in connection with the relations between the United States and Latin America, Blaine revived the idea of a Pan-American Congress. The Congress met during the administration of President Cleveland, who gave the plan only indifferent support, and the Latin-American governments were suspicious; but the Congress was well attended, and a number of matters, such as uniform sanitary regulations, an intercontinental railroad, free navigation of international rivers, and agreements concerning trademarks, patents, and extradition, were discussed, and some tentative understandings were reached. The one real accomplishment of the Congress was the formation of the Bureau of the American Republics, which, located at Washington, and supported jointly by the nations concerned, was to serve as permanent headquarters for the collection of information on American affairs.[1]

A second Congress met in Mexico City in 1901. This conference approved a plan by which American states became parties to the Hague Convention of 1899 concerning the pacific settlement of international disputes, and a treaty providing for a limited form of compulsory arbitration of pecuniary claims was extended for five years, and another treaty was drawn up dealing with the naturalization of citizens. The principle of equal rights for states, large and small, and the need of developing an all-American opinion were subjects presented to

[1] C. R. Fish, *American Diplomacy*, pp. 386–388.

the conference for discussion. In 1910 a fourth Congress met in Brazil, while subsidiary conferences of a scientific nature have since been convened, one in Chile, in 1908, and two in Washington, in 1915–16 and 1919–20. These conferences have been devoted to the advancement of commerce and science among the Spanish-American republics and have aided in promoting a friendly understanding between the various countries.

Latin America and the Monroe Doctrine.—Prior to the Mexican War the policy of the United States with respect to the Monroe Doctrine was largely negative in character. The European powers, although they objected to the doctrine, were obliged to admit its potency. They aimed to avoid its extension to Cuba and other dependencies, and tried by indirect methods to gain a foothold in portions of South and Central America. President Polk added a corollary to the doctrine to the effect that it was the duty of the United States to occupy territory, if necessary, to prevent the introduction of European political systems. At this time certain designs of foreign powers upon Yucatan, Nicaragua, and Mexico proved abortive.[1] During the administrations of Pierce and Buchanan, the original Monroe Doctrine was extended to the protection of the lives and property of American citizens in Latin-American countries whose governments were unstable. At first the Latin-American states were friendly toward the Monroe Doctrine, and they showed an appreciation of the protection accorded them by reason of the closer relationship among the various American governments. But after the Mexican War, when the United States greatly enlarged her territory at the expense of Mexico, Latin-American nations began to realize that the Monroe Doctrine was not wholly an unselfish and humanitarian principle. It was at this time that the theory began to develop that when the people of a Latin-American country show an inability to govern themselves and a disposition to keep

[1] C. R. Fish, *American Diplomacy*, pp. 296–297.

the border states stirred up with misrule and anarchy, it is the duty of the United States to act as pacifier and policeman in such Latin-American territory. In accord with this policy, Presidents Cleveland, Harrison, and Roosevelt supported the principle of the paramount interests of the United States in South-American affairs, and the intention was declared not only to protect South-American countries from European interference, but also to refuse to allow the collection of debts or the assumption of obligations which would in any way interfere with the territorial integrity of Latin-American nations. The most extreme form of the doctrine of paramount interests was that announced by Secretary Olney, to the effect that the United States is practically sovereign on this continent, and that its fiat is law in matters to which it directs its interposition. Although the broad claims of Secretary Olney could not be supported, President Cleveland won a notable victory when his ultimatum to Great Britain, in the Venezuela affair, constrained Great Britain to adopt arbitration instead of force as the method of settling her territorial difficulties with Venezuela. Thus a series of events raised suspicions among the leaders in the Latin-American countries that the Monroe Doctrine, instead of serving as a means of protection to weak and struggling nations, was being used as a cloak for designs in the way of national aggrandizement by the United States.

Though the Monroe Doctrine, as supported by President Roosevelt, emphasized the right of interposition by the United States when there was a possibility of foreign aggression to the detriment of any of the American nations, Roosevelt assured the Latin-American nations that there was to be no aggrandizement on the part of the United States; that the doctrine was not one under which the United States wished to develop and to extend its authority over South-American countries; and that it was not the idea of the United States to act generally as an international policeman and to use force in supporting and

extending the Monroe Doctrine. This same view was expressed more fully by Secretary Root, and was modified by the recent announcement of President Wilson, in which he declared that

> . . . the United States will never again seek one additional foot of territory by conquest. She will devote herself to showing that she knows how to make honorable and fruitful use of the territory she has and she must regard it as one of the duties of friendship to see that from no quarter are material interests made superior to human liberty and national opportunity. . . . It is the relationship of a family of mankind devoted to the development of true constitutional liberty.

Thus it appears that prior to the Mexican War the Monroe Doctrine had been looked upon as a policy adopted for the benefit of the Latin-American states, a policy conceived in a spirit of helpfulness toward weaker nations which might become a prey to the stronger European nations. But, since the Mexican War, the advocates of expansion and the supporters of the growing commercial interests changed the interpretation of the doctrine to one which ascribed to the United States the purpose to dominate and preserve the Latin-American nations as the legitimate field for the extension of American commercial dealings.

It is this change in the policy and attitude of the United States that has led to the growing belief among Latin Americans that the Monroe Doctrine was not adopted for their benefit, but for the special interest and profit of the United States. It is claimed that Latin-American nations have a just right to participate in the forming of international policies and particularly to regulate their own concerns. These countries claim that their population and resources, potentially at least, are fully as great as those of the United States and deserve as important consideration. The growing interest of the Latin-American states in their own common problems, and their tendency to combine for the purpose of fostering those interests, are evidenced by the formation of three unions

—namely, one composed of the Central-American states; one, of Colombia, Peru, Venezuela, and Uruguay; and one, of Argentine, Brazil, and Chile.

Every Latin-American country is in form a republic, although not all the governments are based on popular sanction. A tradition exists in Latin America that the upper class should rule. From this class come the presidents, judges, and other officers. By the side of this political aristocracy are to be found business men, merchants, and capitalists, who share in the interests and advantages of government. Below these classes is a body of soldiers, who participate in war, conquest, and revolution. Unfortunately, in many South-American states, this latter class is still powerful, and few Latin-American governments are entirely free from the danger of revolution. It is this condition which renders it imperative that the protection of the United States be not entirely withdrawn.

Recently, the need of continuing the doctrine has been put to the test in the settlement of the question whether the occupation of territory for refusal to pay debts is justifiable. The South Americans have themselves aided in the formulation of various doctrines relating to this matter. The first of these is the Calvo doctrine. The principle laid down by Calvo, a Brazilian authority on international law, was to the effect that in view of the generally acknowledged rights of nations, the recovery of debts and the settlement of private claims does not justify armed intervention. He meant by this principle to deny foreign governments the right to insist on the collection of debts due to their subjects. A revised form of this view was announced by Drago, the Minister of the Argentine Republic. Drago maintained that, since the collection of loans by military means implies territorial occupation to make them effective, and since territorial occupation signifies the suppression or the subordination of government of the countries on which it is imposed,

such measures are obviously at variance with the doctrines which have been many times proclaimed by the nations of America. This principle is held to admit of diplomatic action, but to preclude the use of force in securing the payment of debts.

Though it is no longer possible for the United States to assume the position of general policeman for South America, as was suggested by President Roosevelt in 1904, it is nevertheless true that the United States is in a position to exercise considerable influence over South-American countries. Latin-American writers admit, as a rule, the service which the United States has rendered by supporting the principle of America for Americans. Nevertheless, the time has passed when this principle can be upheld without the active assistance and co-operation of South-American countries. It is now necessary to look upon the South-American states as co-equal and co-responsible in the maintenance of the principle of nonintervention of European powers.

Recently the Monroe Doctrine has been subjected to rather caustic criticisms both in Latin-American countries and in the United States. A noted authority on Latin-American affairs has characterized the doctrine as "an obsolete shibboleth."[1] The spirit of opposition to the Monroe Doctrine has developed to a point where the specific efficacy of the doctrine will, it is contended, be greatly reduced unless the United States can join with the leading South-American countries in a combined effort to support and defend the principle of nonintervention, and thus to assure the unification, the independence, and the harmonious development of all of the states of the American continent. That such a combination is feasible has been indicated by various diplomatic and political developments; and that the Monroe Doctrine will be given force and prestige through such a union of American

[1] Hiram Bingham, *The Monroe Doctrine, an Obsolete Shibboleth* (Yale University Press, 1913).

states seems well within the bounds of possibility. Such a combined support for the Monroe Doctrine will, it is believed, require a modification of the Caribbean policy and other imperialistic tendencies in the United States which look toward Spanish America with a view to "the establishment of protectorates, the supervision of finances, the control of all available canal routes, the acquisition of coaling stations, and the policing of disorderly countries."[1]

Expansion Policy of the United States

From the beginning of the United States as a nation a policy of territorial expansion has played a prominent part in internal politics and in the negotiations with foreign powers. The representatives of the United States who participated in the making of the Treaty of Paris made sure of the control of the United States over the territory to the westward as far as the Mississippi River, and the Northwest Ordinance confirmed the plan by which a large part of this region became a domain of the Federal government. The way was left open for Canada to join the United States, and for certain portions of Spanish America, such as Florida and Cuba, to come within the sphere of influence of the new country.[2] It was not long after the inauguration of the Federal government that a train of fortunate circumstances rendered it possible to secure, by means of the Louisiana Purchase, a large part of the territory west of the Mississippi River. Furthermore, by a series of negotiations Florida was secured from Spain. The expansion policy of the first few decades was aptly described by Lucas Alaman, Mexican Secretary of Foreign Affairs:

> The United States of the North have been going on successfully acquiring, without awakening public attention, all the territories

[1] J. H. Latané, *From Isolation to Leadership* (Doubleday, Page & Co., 1919), p. 132.

[2] C. R. Fish, *American Diplomacy*, p. 208.

adjoining theirs. Thus we find that in less than fifty years they have succeeded in making themselves masters of extensive colonies belonging to various European Powers, and of districts, still more extensive, formerly in possession of Indian tribes, which have disappeared from the face of the earth; proceeding in these transactions, not with the noisy pomp of conquest, but with such silence, such constancy, and such uniformity that they have always succeeded in accomplishing their views. Instead of armies, battles, and invasions, which raise such uproar, and generally prove abortive, they use means which, considered separately, seem slow, ineffectual, and sometimes palpably absurd, but which united, and in the course of time, are certain and irresistible.[1]

The gradual growth of a policy of expansion in the period from 1830 to 1840 brought forward three great controversies—namely, those over the ultimate control, respectively, of Texas, Oregon, and California. Missionaries, merchants, and political adventurers vied with one another in carrying American laws, customs, and institutions into territories which, it was contended, were destined to be transferred from other powers to the United States. The popular slogan that Great Britain was secretly designing to seize these territories, and the growing visions of a great American nation, led one administration after another to champion the cause of expansion. The great bone of contention, slavery, alone seemed to prevent immediate action. After long and wearisome negotiations Texas was admitted into the American Union by a joint resolution of Congress on March 1, 1844, the Senate previously having refused to approve a treaty for this purpose. In June, 1846, a treaty with England was ratified which fixed the northern boundary of the United States at the forty-ninth parallel, and thus assured the possession of the Oregon territory to the United States. It was in a message concerning the refusal of Great Britain to accept the line of the forty-ninth parallel that President Polk reaffirmed the Monroe Doctrine for the first time since its formulation. The President said: "It should be distinctly

[1] Quoted in C. R. Fish, *American Diplomacy*, p. 243.

announced to the world as our settled policy that no future European colony or dominion shall with our consent be planted or established on any part of the North American Continent." The brusque method of stating American claims, supported, no doubt, by the bluff involved in the popular slogan "54° 40′ or fight," led Great Britain to accept a compromise which she had previously regarded as impossible.

Finally, after an aggressive war upon Mexico, the United States acquired by treaty the extension of Texas to the Rio Grande, and the large territories of New Mexico, Arizona, and California. In 1853 this territory was rounded out by the Gadsden Purchase. For a long time the expansion policy was submerged in the turmoil of internal politics. During this period Alaska was acquired by purchase, although at the time it was regarded as practically uninhabitable and worthless. It was not until the Spanish-American War that the advocates of expansion again had an opportunity to extend the territorial domains. At this time the much-coveted island of Porto Rico was annexed, as well as the Philippine Islands, and a protectorate was established over Cuba.

The relations with Cuba reach back into the early history of the United States. In 1823 Secretary of State Adams suggested that the annexation of Cuba had become "indispensable to the continuance and integrity of the Union itself." In 1827 the government of the United States showed its interest in the matter of slavery in the island of Cuba, and a few years later the principle was announced that the United States could not see with indifference Porto Rico and Cuba pass from Spain into the possession of any other power. In 1848 a movement was initiated looking to the purchase of the island of Cuba. No progress could be made with the Spaniards in this direction. Following a series of revolutions in Cuba, a proposal was made to secure order and peace in the island by a joint grant involving France, England, and the United

States. This was objected to, and it was again insisted that no European power could, with the sanction of the United States, establish itself in power in this island. As early as 1853 the policy of annexation was growing and received support on the part of the administration. President Pierce, in his inaugural address, declared that "our attitude as a nation and our position on the globe render the acquisition of certain possessions not within our jurisdiction eminently important for our protection." It was the slavery issue that prevented, at this time, the consummation of the President's will.

In 1869 President Grant announced the policy of the United States toward Cuba as follows:

> These dependencies are no longer regarded as subjects of transfer from one European power to another by which the present relation of colonies ceases. They are to become independent powers exercising the right of choice and of self-control in the determination of their future condition and relations with other powers.

After several other efforts at joint intervention the difficulty was settled, after the sinking of the battleship *Maine*, by the declaration of war upon Spain by the United States. As a result of a series of victories Spain was forced to come to terms ceding to the United States the Philippines and Porto Rico and relinquishing entirely her control over Cuba. The United States indicated its attitude in relation to Cuba by arranging to relinquish all dominion over the island and to turn the government over to the people on condition that Cuba would agree never to enter into any treaty or compact with any foreign power which would interfere with the independence of the island and should concede to the United States the right to intervene for the preservation of the Cuban government and for the protection of life, liberty, and property. Cuba agreed also to render available to the United States lands for coaling or naval stations, and practically granted the United States a protectorate over the island, otherwise continuing as an independent state.

The influence of the United States was extended by a plan, approved by Congress and the President, whereby American citizens were permitted to take possession of small uninhabited islands for the purpose of extracting guano. It was understood that jurisdiction would be exercised only temporarily, but more than fifty islands in the Pacific Ocean and in the Caribbean Sea have been held for varying periods of time to be under the jurisdiction of the United States. A few of these, such as Midway Island, have been held permanently. But control over these small islands was merely a prelude to the extension of the influence of the United States in the Pacific.

American influence in the Pacific was first asserted over Hawaii, where as early as 1820 a representative was sent to look after commercial interests. In 1842 the protection of the Monroe Doctrine was extended to the islands, and from that time Hawaii was regarded as being within the sphere of influence of the United States. Though there was a sentiment in the islands in favor of annexation, the feeling against such a move was so strong in the United States that annexation was temporarily delayed. In the meantime a change in administration and the successful conclusion of the Spanish-American War gave an opportunity to complete annexation, which had been agreed upon by the leaders of the Republican party.

In 1872 a foothold was gained in Samoa, and by 1878 a sort of protectorate was established by treaty. Great Britain and Germany contended for supremacy over these islands, and for a while there was grave danger of international complications. Joint control was exercised temporarily by the United States, Great Britain, and Germany; but, such control proving unsatisfactory, a treaty of division was signed by which the islands were divided between the United States and Germany.

But by far the most significant move in respect to foreign affairs in the Pacific Ocean and the territories bordering it was taken when, in 1858, commercial and diplomatic

relations were established with Japan and China. And contrary to the announced policy of noninterference in the affairs of foreign powers, the representatives of the United States showed a willingness to co-operate with European powers in establishing peace and extending commercial dealings in Asia. In a number of instances the United States joined with European powers in helping to secure order, the most notable occasion being the joint expedition to suppress the "Boxer" uprising in China. The United States refused, however, to become a party to some of the designs for the dismemberment of the Chinese Empire, and became an upholder of the integrity of China and an advocate of an "open door" in commercial relations. Through this attitude the United States has gained the confidence and good will of China and to a certain extent the suspicion and hatred of Japan. For Japan, since her rise as a world power, has had designs upon portions of China, and, following her victories in the wars with Russia and Germany, has taken active steps to extend her control over Russian and Chinese territory. Recently Japan has formulated a doctrine for Asia which corresponds to the Monroe Doctrine for America. The acquisition of Hawaii, the Philippines, and other islands in the Pacific, as well as the leadership assumed by the United States in the adjustment of the relations of other powers with China, has brought into occasional controversy and misunderstanding the two great powers in the Pacific, Japan and the United States.

The treatment of the Japanese in California, particularly in relation to land ownership and school privileges, has created such a delicate situation that the diplomacy of both countries will be taxed to avert a misunderstanding which may seriously impair the friendly relations which have heretofore prevailed. An apparent weakness in our Federal system of government renders the solution of this problem particularly difficult. Although the Federal government is responsible for all dealings with foreign nations

and is held accountable for the mistreatment of aliens of all nationalities, much of the legislation affecting aliens is enacted by the states. Except in so far as matters relating to the protection of aliens have been included in treaties or have been covered by acts of Congress, the Federal government is helpless to avert action which may result in serious international misunderstandings. The helplessness of the federal authorities in dealing with a critical situation of this kind was illustrated in the New Orleans incident of 1891, when a mob killed a number of Italians suspected of having murdered the chief of police of the city. The city and state authorities refused to take any action looking to the punishment of the leaders of the mob, and the Italian authorities demanded that the Federal government intervene. Such intervention was refused on the ground that the Federal government had no authority to proceed in the case. A breach between the two countries was averted by the withdrawal of the demand for the punishment of the guilty and by the acceptance instead of a money indemnity.[1] In a case like this, as in the California case, the Federal government can request the states to act or to defer action, on the ground that international complications are involved; but the states can, if they choose, ignore such request.

The building of the Panama Canal has resulted in the inauguration of a new feature in the expansion policy of the United States—*i. e.*, the advance into a position of dominance in the Caribbean Sea. The relinquishment of Spanish control in the Caribbean, in the first quarter of the nineteenth century, was followed by the supremacy of Great Britain. To strengthen the position of the United States an effort was made as early as 1867 to purchase Santo Domingo and the Danish West Indies. A treaty was drawn up which received the approval of Den-

[1] The City of New Orleans *vs.* Abbagnato, 62 Federal Reporter, 240, 1894. This case is reported with a supplementary note in Scott's *Cases on International Law* (West Publishing Company, 1906), p. 320.

mark and was supported on a popular vote by the inhabitants of the islands, but the Senate refused to sanction the transfer of jurisdiction. It was not until the close of the Spanish War that the United States began to secure a foothold in the Caribbean Sea, but by a succession of acts American control was rapidly extended.

As previously stated, by the treaty of peace at the close of the Spanish War the United States acquired Porto Rico and established a protectorate over Cuba. By the Hay-Pauncefote Treaty of 1901 England relinquished her claim to an equal right of control over an Isthmian canal on which she had insisted for half a century. This treaty resulted in the transfer of naval supremacy in the West Indies to the United States[1] and in the formulation of new policies involved in the determination to build and control an Isthmian canal. These policies relate to the territory comprised within a sphere of influence of the Panama Canal and include "the establishment of protectorates, the supervision of finances, the control of all naval routes, the acquisition of naval stations, and the policing and administration of disorderly countries."[2] In the execution of these policies the United States acquired the Canal Zone in 1903, and in 1904 the President established financial supervision over the Dominican Republic. To these acquisitions were added control over Haiti, in 1915, and special privileges and a naval station from Nicaragua, while the Virgin Islands were secured by treaty from Denmark in 1917. In 1910, after a series of revolutions in Central America, President Taft took steps to place Nicaragua and Honduras under the financial supervision of the United States; but, as in the case of Santo Domingo, the Senate refused to concur in the treaties drawn for this purpose and the executive was compelled to act independently. Despite the failure of the treaty, American marines have remained in Nicaragua,

[1] J. H. Latané, *The United States and Latin America*, pp. 267–268.
[2] *Ibid.*, p. 267.

and a treaty was finally approved by the Senate which established a limited protectorate over the country. Costa Rica, Salvador, and Honduras protested the ratification of this treaty and carried their case to the Central American Court of Justice, established at the instance of the United States in 1907, which, however, declined to declare the treaty void, on the ground that it had no jurisdiction over the United States.

A series of incidents in the carrying out of the Caribbean policy of the United States appears to bear out the prophecy of President Roosevelt voiced in his annual message to Congress in 1904. The President said:

> Chronic wrongdoing, or an impotence which results in a general loosening of the ties of civilized society may, in America, as elsewhere, ultimately require intervention by some civilized nation, and in the Western Hemisphere the adherence of the United States to the Monroe Doctrine may force the United States, however reluctantly, in flagrant cases of such wrongdoing or impotence, to the exercise of an international police power.

One of the most recent acts in the American policy of expansion was the encouragement of the administration given to the revolt of Panama and the precipitate recognition of the Republic of Panama. Under the protection of an American squadron the new state was formed and Colombian authorities were prevented from interfering. This action was held to be justified by the refusal of Colombia to sign a treaty containing a reasonable offer for the right over Panama necessary for the construction of a canal.

The new republic granted to the United States a zone of five miles on each side of the proposed canal. The protection of the United States was to extend over Panama and was recognized in the Panama constitution, which states that

> The government of the United States of America may intervene anywhere in the Republic of Panama for the re-establishment of constitutional peace and order if this should be disturbed, provided that

by virtue of public treaty said nation should assume or have assumed to guarantee the independence and sovereignty of this Republic.

Thus, while objecting to territorial aggrandizement in America by foreign powers, and while disclaiming any intention to acquire and govern large colonial dominions, the United States has come into possession of extensive territories in North America and has brought under her control by annexation, protectorates, or spheres of influence islands in the Atlantic and Pacific Oceans and portions of Central America.

Problems of Colonial Government

Among the difficulties which confront modern governments are those which have to do with the control of dependencies or subject territories. Since the time of the Greeks, parent states have maintained close connections with and some form of political control over outlying provinces or over distant territories. While the colonies of Greece were politically free and self-governing units, those of Rome were brought under the centralized dominion of the Roman government. Subsequent territorial governments have followed one or the other of these main types. One of the greatest movements of modern times was the result of the persistent effort to parcel out and to secure control of all the portions of the world not under the dominion of great political powers. By means of commercial agents, missionaries, and other emissaries, an entering wedge was acquired for the first form of political control known as the sphere of influence. Thus a nation acquired by treaty or by mutual concessions "the exclusive privilege of exercising political influence, or concluding treaties or protectorates, of obtaining industrial concessions, and of eventually bringing the region under its direct political control." The sphere of influence is always regarded as a transitional stage, and it is usually expected that it will be followed by occupation and political conquest or the establishment of a protec-

torate. Large parts of Africa have been brought under the sphere of influence of European powers, and Japan now claims portions of China as being within her sphere of influence.

The protectorate differs from the sphere of influence in that the state holding the protectorate exercises control over certain foreign relations. Subject to some restrictions affecting foreign affairs, local government is not interfered with unless the local peace is disturbed by uprisings or revolutions. England's relation to Egypt has for a long time been that of a protectorate, and such is the relation of the United States to Cuba. The protectorate is, also, a temporary condition and normally leads to the next step, that of direct dependency.

Direct dependencies are of three main types: 1. Self-governing colonies; 2. Colonies with representative government; 3. Colonies under direct control of the mother country. In the first class are Canada, Australia, and South Africa, which possess rights and powers of self-government amounting almost to independence, yet have very close relations with the home government, based largely upon mutual ties of interest, race feeling, and political sentiment. When the home government permits the establishment of a representative body in the colony but retains control through the governor, his council, and appointed representatives, the arrangement is known as the representative type of colonial government. Canada and Australia had representative governments prior to the establishment of self-government, and numerous English colonies have been governed in this way. The first regular form of government granted to the Philippines and to Porto Rico was of this type. Representative government frequently proves unstable, and it is customary for the colonies to demand greater freedom amounting ultimately to a modified form of self-government. In the third group are those colonies in which the government is completely in the hands of officials appointed by the home govern-

ment. This type is usually established after conquest or cession of territory until a regular form of government may be provided, and it is also the form of colonial government maintained for the control of savage or semibarbarous communities. One of the best examples of direct control is England's government of India.[1] But the unstable conditions which obtain under a government of this type generally lead to an effort to establish a modified form of representative government or self-government.

The government of the United States in the acquisition and settlement of a vast territory has developed a somewhat unique colonial policy. When the Northwest Territory was acquired, the announcement was made, by way of explanation of the general principles of the system, that the territory "shall be disposed of for the common benefit of the United States, and be settled and formed into distinct republican states, which shall become members of the Federal Union, and have the same rights of sovereignty, freedom and independence as the other states." This general principle was made a part of the Ordinance of 1787 and the fundamental principles of civil and religious liberty enjoyed by the citizens of the original states were granted to the inhabitants of the Northwest Territory. They were assured likewise that representative government would be granted and that in due time the territory would be admitted as states. The plan of government arranged by the Ordinance and the whole tenor of its provisions suggest the view that Congress was making these regulations in the execution of a solemn trust, and that the inhabitants were to be protected in their rights until state constitutions should be prepared and application should be made to Congress for admission as states. The acts providing for the organization of subsequent territory embodied these principles. Prior to 1898 treaties of acquisition generally contained clauses granting the advantages,

[1] Recent reforms in the government of India are designed to change direct colonial government to a type of representative government.

privileges, and immunities of the citizens of the United States to the inhabitants, together with the express promise that the states formed out of the territory should at the discretion of Congress be admitted into the Union. As soon as possible, therefore, Congress divided the district into separate territories, and established a government in each, with the expectation that each would go through the necessary preparation and in due course be ready to enter the family of states. Under such acts Congress and the courts have carefully guarded the private rights of the inhabitants. The Constitution and the laws of Congress which are applicable have been considered in force.

The treaties by which Alaska and Hawaii were acquired contained no express provision as to future statehood, but these territories have been governed on much the same principles as other territories, and may be considered as in tutelage preparatory to admission to the Union. When Porto Rico and the Philippine Islands were acquired from Spain, it was maintained that control over these territories was absolute and not subject to the limitations under which previous territories were governed. Though these colonies were at first practically managed as executive colonies, the President through his appointees, the Governor and Council, maintaining his supremacy, the tendency in both has been to extend a greater degree of self-government and to turn over local affairs more and more to the inhabitants of the islands. Attempts to grant independence to the Philippines have so far failed. Whether these colonies can ultimately be granted a degree of autonomy similar to that which now prevails in American states is a question on which opinions differ widely. The United States maintains, then, a diversified policy of colonial administration involving a limited control over certain territories regarded as being within its sphere of influence, direct control over certain island possessions, and a form of representative government for a few territories.

A new venture in colonial government has been introduced by the mandatory system of the Covenant of the League of Nations:

CONTROL OF COLONIES AND TERRITORIES.

ARTICLE 22. To those colonies and territories which, as a consequence of the late war, have ceased to be under the sovereignty of the states which formerly governed them, and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilization and that securities for the performance of this trust should be embodied in this Covenant.

The best method of giving practical effect to this principle is that the tutelage of such peoples should be intrusted to advanced nations who, by reason of their resources, their experience or their geographical position, can best undertake this responsibility, and who are willing to accept it, and that this tutelage should be exercised by them as Mandatories on behalf of the League.

The character of the mandate must differ according to the stage of the development of the people, the geographical situation of the territory, its economic conditions and other similar circumstances.

Certain communities formerly belonging to the Turkish Empire have reached a stage of development where their existence as independent nations can be provisionally recognized subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone. The wishes of these communities must be a principal consideration in the selection of the Mandatory.

Other peoples, especially those of Central Africa, are at such a stage that the Mandatory must be responsible for the administration of the territory under conditions which will guarantee freedom of conscience and religion, subject only to the maintenance of public order and morals, the prohibition of abuses such as the slave trade, the arms traffic, and the liquor traffic, and the prevention of the establishment of fortifications or military and naval bases and of military training of the natives for other than police purposes and the defense of territory, and will also secure equal opportunities for the trade and commerce of other Members of the League.

There are territories, such as Southwest Africa and certain South Pacific islands, which, owing to the sparseness of their population or their small size, or their remoteness from the centers of civilization, or their geographical contiguity to the territory of the Mandatory, and other circumstances, can best be administered under the laws of

the Mandatory as integral portions of its territory, subject to the safeguards above mentioned in the interests of the indigenous population.

In every case of mandate, the Mandatory shall render to the Council an annual report in reference to the territory committed to its charge.

The degree of authority, control or administration to be exercised by the Mandatory shall, if not previously agreed upon by the Members of the League, be explicitly defined in each case by the Council.

A permanent Commission shall be constituted to receive and examine the annual reports of the Mandatories, and to advise the Council on all matters relating to the observance of the mandates.

Under this system it was proposed that the United States assume a mandate over Armenia; but Congress refused to agree to this arrangement, and at present the United States is not a party to these provisions of the Covenant.

Two factors have tended to draw the United States away from its former theory of isolation—namely, the territorial and colonial expansion which has necessarily involved the nation in some of the main currents of international events; and the commercial and industrial developments of the last century which have resulted in extending the interests and influence of the United States to every quarter of the globe. The Spanish-American War brought, for the first time, an avowed recognition of the fact that the United States intended to assume the rôle of a world power. Presidents Roosevelt and Taft followed the policy of participating in world affairs and of assuming some of the duties and responsibilities thereby involved.

The connection between our foreign affairs and those of other countries has steadily become closer and the tendency within recent years has been to have the United States join in consideration of the fundamental policies and issues of international affairs. President Wilson, in a speech in defense of a league to enforce peace, made it clear that he was disposed not only to follow in the path of his immediate predecessors, but also to go farther in assuming international duties and responsibilities.

It is inconceivable [he said] that the people of the United States should play no part in that great enterprise (a new plan for the foundations of peace among the nations). To take part in such a service will be the opportunity for which they have sought to prepare themselves by the very principles and purposes of their polity and the approved practices of their government, ever since the days when they set up a new nation in the high and honorable hope that it might in all that it was and did show mankind the way to liberty. . . . In holding out the expectation that the people and the Government of the United States will join the other civilized nations of the world in guaranteeing the permanence of peace upon such terms as I have framed. I speak with the greater boldness and confidence because it is clear to every man who can think that there is in this promise no breach in either our traditions or our policy as a nation, but a fulfillment rather of all that we have proposed or striven for. I am proposing, as it were, that the nations should with one accord adopt the doctrine of President Monroe as the doctrine of the world: That no nation should seek to extend its policy over any other nation or people, but that every people should be left free to determine its own policy, its own way of development, unhindered, unthreatened, unafraid, the little among the great and powerful. . . . There is no entangling alliance in a concert of power.

Subsequent events, however, carried the United States into war instead of peace and involved the nation more definitely than has ever been the case heretofore in the intricacies and difficulties of international diplomacy and world politics. In his war message to Congress, April 2, 1917, President Wilson recognized the profound significance of the declaration of war which would involve the utmost practicable co-operation in counsel and in military action with the governments at war with Germany, and the extension to those governments of the most liberal aid, commercial and financial.

The story of the aid of the United States in men, money, and other resources cannot be rehearsed. Suffice it to say that after joining with the enemies of Germany and her allies, and generously assisting in their defeat, President Wilson again reiterated his belief that it was the duty of the United States to help maintain the peace of the world, and outlined some of the conditions necessary to secure this end, as follows:

Open covenants of peace, openly arrived at, after which there shall be no private international understandings of any kind, but diplomacy shall proceed always frankly and in the public view.

Absolute freedom of navigation upon the seas outside territorial waters, alike in peace and in war, except as the seas may be closed in whole or in part by international action for the enforcement of international covenants.

The removal, so far as possible, of all economic barriers and the establishment of an equality of trade conditions among all the nations consenting to the peace and associating themselves for its maintenance.

Adequate guaranties given and taken that national armaments will be reduced to the lowest point consistent with domestic safety.

A free, open-minded and absolutely impartial adjustment of all colonial claims, based upon a strict observance of the principle that in determining all such questions of sovereignty the interests of the populations concerned must have equal weight with the equitable claims of the government whose title is to be determined. . . .

A general association of nations must be formed under specific covenants for the purpose of affording mutual guaranties of political independence and territorial integrity to great and small states alike.

The treaty of peace signed at Paris containing a Covenant for a League of Nations involves some international problems of the greatest concern to the United States. Among the characteristics of the Covenant it is prescribed that all nations joining the League shall co-operate in "the firm establishment of the understandings of international law as the actual rule of conduct among governments" and in "the maintenance of justice and a scrupulous respect for all treaty obligations in the dealing of organized peoples with one another"; that plans shall be formulated for the reduction of armaments; that members shall agree to submit controversies to inquiry and arbitration before going to war; and that a permanent international court of justice be established to determine questions of a justiciable character. Two of the chief provisions of the Covenant are Article X, which obligates the members of the League to "undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all mem-

bers of the League"; and Article XVI, which provides that the members shall join in severing diplomatic relations with members who refuse to abide by the terms of the Covenant, shall sever all trade and financial relations, and shall, in case of necessity, "contribute to the armed forces to be used to protect the covenants of the League."

Although the important nations of the world, with but a few exceptions, joined the League soon after its formulation, the Senate of the United States, returning to the former theories of isolation and national independence, rejected both the Covenant and the treaty of peace. Objections were raised principally to Article X and to the obligations which it was thought the League involved in the way of rendering military assistance in the maintenance of peace and order in Europe. The election of Senator Harding, the nominee of the Republican party, to the office of President, on a platform which practically condemned the League of Nations and asserted again a policy of national isolation or the principle of entering into an association of nations largely dictated in its terms and conditions by the United States, raises anew the question whether the American nation should aim to act to a large degree independent in its foreign interests and obligations or whether international co-operation should be fostered and extended.

It may well be asked whether the policy of isolation which was the aim of some American statesmen in the early part of the nineteenth century is compatible with the new interpretation of the Monroe Doctrine, with the colonial expansion of the United States in the Atlantic and Pacific oceans, and with mutual international obligations previously assumed. It remains, then, to be determined whether with increasing international co-operation in commercial and industrial affairs, in education, art, and literary attainments, in labor and economic conditions, and in travel and social intercourse, it is good policy

for the United States to hold itself aloof from a full and frank policy of international political co-operation.

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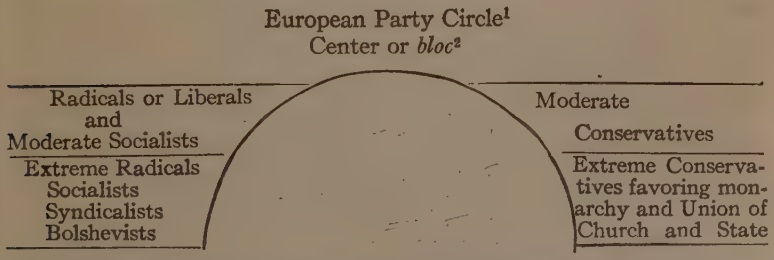
CHAPTER IV

WHAT IS THE FUNCTION OF GOVERNMENT?

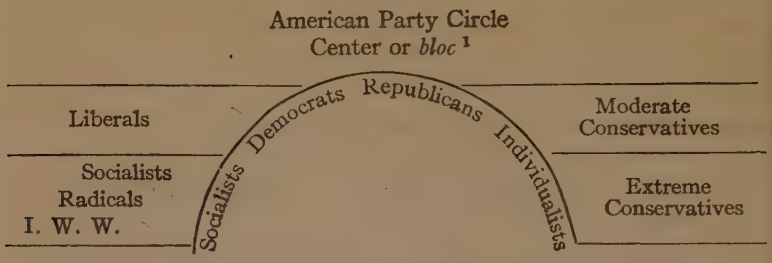
Parties and the Functions of Government

Though the subjects considered in the previous chapters are of special significance in the organization and operation of modern governments, many other principles and problems worthy of consideration have had to be omitted, necessarily, in the compass of a single volume. Before concluding this survey it is necessary, however, to present a short account of one of the fundamental issues as to the purpose and scope of the entire process of government. This issue has engaged the attention of political thinkers and practical statesmen ever since the organization of governments. Differences of opinion on this and related issues have led to the formation of parties whose aim it has been to secure government control to carry into effect their respective views. This cleavage can best be understood by a comparison of the general basis of political divisions in Europe and America.



[1] The party circle is based on the practice in European legislative chambers (the seats of which are frequently arranged in a semicircle) for the parties to be seated in groups with the conservatives on the right and the radicals on the left.

[2] Normally the center, or the *bloc*, is the dominant group in European



Though the Democrats or Republicans, or parties corresponding to these designations, have been in continuous control of state and Federal governments in the United States, the dominant center, or *bloc*, has been influenced at all times by the extremes in the party circle, the individualists, on the one hand, and the liberals, or socialists, on the other. It is necessary, therefore, to undertake a brief analysis of the political doctrines of these extreme groups and to trace some effects of their doctrines in the formulation of governmental policies.[2]

Individualism.—The doctrine of individualism is an ancient one and has been a dominant motive behind the policies of government since the middle of the eighteenth

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elective chambers and, with an adhesion of support either from the Liberals and Radicals or from the Conservatives, can control the policies of the government. In France the Radicals and Moderate Socialists, with the support of the left center, have for a long time maintained control in the Chamber of Deputies. In Germany the *bloc* with the Moderate Conservatives has been the controlling party. The chief differences in parties in European countries are that the number of groups varies considerably and that the nations differ especially as to the strength of the Syndicalists and Socialists on the one hand and the Extreme Conservative groups on the other.

[1] The dominant party group in the United States has been almost invariably the center, or *bloc*, the policies of the controlling party shifting on occasion either to the liberal left or to the more conservative right. The Democratic party began as a liberal and radical party and the Federalists were the Conservatives. For a long time, due to peculiar conditions, sectional feeling, race problems, etc., the standard division of parties along liberal and conservative lines was overshadowed by somewhat unnatural party groupings. A return to the former grouping seems to be indicated in the tendency for factions to develop in each of the major parties, the basis of division apparently being conservatism, otherwise known as "standpatism" and liberalism—a liberal and a conservative wing being found in each party.

[2] *Cf.* part ii, chap. ii, for consideration of parties and party methods.

century. It was for a long time the official creed of the leading governments of the world, and was defended by some of the greatest political thinkers of the eighteenth and nineteenth centuries.[1] According to this theory the state was to interfere as little as possible with the individual in the enjoyment of his rights and privileges. It was to impose few, if any, restrictions upon his business and commercial activities. The theory of non-interference grew into a government philosophy which was widely accepted and practiced in Europe at the time governments were established in America. "It was thought that the rivalry between individuals would develop strength of character and would stimulate originality by offering the rewards of wealth and fame; society would thereby be the gainer, for it would lead to an increased production of wealth."[2] The theory became associated with and was looked upon as a corollary to the developing doctrine of popular sovereignty. In America the doctrine of natural and inherent rights beyond state control served as a basis for a corresponding theory of civil liberty which proposed to limit the functions of government to a minimum necessary to keep the peace. Jefferson characterized the prevailing view in the dictum "that government is best which governs least."

At this time "strong emphasis was laid on the value of individual enterprise, the importance of initiative, upon the significance of self-reliance and responsibility as factors in the growth of the community. It was asserted that these were the typical qualities upon which American prosperity had been based."[3] The theories of independence, individual

[1] Among the leading exponents of individualism were Adam Smith, whose work on *The Wealth of Nations*, and Jeremy Bentham, whose *Principles of Legislation* served as a philosophic basis for later theories. The doctrines of individualism were chiefly advanced by the Manchester School of Economics under the leadership of such noted writers as David Ricardo, James Mill, John Stuart Mill, and Thomas Robert Malthus.

[2] J. Selwyn Schapiro, *Modern and Contemporary European History* (Houghton, Mifflin Company, 1918), p. 42.

[3] C. E. Merriam, *American Political Ideas* (The Macmillan Company, 1920), p. 314.

initiative, and self-reliance which were fostered in the settlement of the American colonies and in the pioneer conditions which prevailed in the United States, led to the conclusion that "the individual should be as little as possible restrained by the law; and that the state should pursue, except in cases of extreme urgency, a policy of non-interference with the development of individual conduct."[1]

Socialism.[2]—The extreme position of the individualists and the evils resulting from the fierce economic and industrial competition which ensued led to the development of opposing groups of political thought supporting doctrines commonly designated as socialism, collectivism, and communism. Though there are many different groups of this type holding a variety of opinions, there are certain doctrines which are common to all but a few of the several groups. In the first place, all of the groups criticize the existing industrial order, which they hold is largely based on an individualistic philosophy. The chief criticisms of the social order, based, as is contended, on the theories of individualism and civil liberty, are:

That the invention of machinery and the rise of factories rendered it possible for the capitalist owners of the means of production to become the dominant class and the proletariat composed of propertyless workers, the subject class; that the compensation of the laborer under the capitalist system takes the form of a competitive wage, which, it is the aim of industrial managers, to keep as low as possible; that the capitalist system necessarily involves great losses through duplication of establishments and services and through the advertising of goods; that it fosters poverty on the one hand and extreme accumulation

[1] C. E. Merriam, *American Political Ideas* (The Macmillan Company, 1920), pp. 314, 315.

[2] The theories of the Syndicalists, Bolshevists, and followers of the I. W. W., whose aim is to abolish the present political state and to substitute therefor an industrial state controlled and managed by the workers, have had comparatively little effect upon American governmental policies and need not be considered in this connection.

of wealth on the other hand, with the consequent development of an unproductive leisure class.

The socialist groups have formulated certain theories on which the indictment of the capitalist system is based and the various programs of reform constructed. Chief among these theories are the economic interpretation of history, which maintains that economic factors largely determine ethical standards, legal codes, and religious, moral, and social ideas; the class-struggle theory, which holds that the history of man's development is largely comprised in "a record of struggles between economic classes," and that the modern form of that struggle is a conflict between the capitalist class and the proletariat; and the surplus-value theory, that the difference between the total value produced by labor and the value of the labor power consumed in the production of an article is surplus value and this difference represents the measure of the exploitation of the worker.[1]

Any attempt to summarize the constructive programs of the socialist groups meets with great difficulties, for their platforms are often vague and contain generalities which require extended explanations or they differ so widely as to render comparisons misleading. A few general characteristics of the programs may be noted. The majority of them provide for the nationalization of the means of production and distribution by which government management would replace private management in all the important economic relations. Individuals according to all but the communists might still have property rights in such things as houses, clothing, and food. Many groups also include the nationalization of the land as the basis of the operations of production and distribution.[2]

Though the leaders of these groups are constantly working for a complete reorganization of the political and social order, they are willing, in the meantime, to join with

[1] *Cf.* John Spargo and G. L. Arner, *Elements of Socialism* (The Macmillan Company, 1912), parts i and ii.

[2] *Ibid.*, part iii.

other parties in securing practical reforms to improve the general conditions of the working classes. Thus among the planks of the reform programs of socialists are such matters as universal suffrage, direct legislation including the initiative, referendum, and recall, and proportional representation. They usually favor the abolition of the powers of the courts which are regarded as protecting class privileges; they favor the abolition of child labor and the reduction of the hours of work per day. Thus many of the features of modern industrial legislation, such as workmen's compensation, social insurance, and legislation regarding wages, hours of labor and sanitary conditions, have been sponsored by the socialist groups.

It is obvious from this brief summary of the principles and policies of socialism that modern governments, with the exception of the soviet system in Russia, are far from accepting the programs of socialism. In the United States these groups have been relatively weak, and with the exception of certain cities have not gained sufficient political power to carry out any more than certain parts of the socialist program. Nor have the principles and policies of the extreme individualists dominated political thinking and practice in the United States. Though the views held by the followers of each of the two extreme groups of the nineteenth century affected in certain respects the organization and administration of government, the course of political development has been along a median line involving the acceptance neither of the program of extreme individualism nor that of socialism. A review of the efforts to regulate business, labor, education, and the social welfare will reveal the shift of political control from a conservative and individualistic regime to a liberal regime which accepts a considerable part of the practical reforms advocated by the socialists.

The regulation of business and economic conditions and some of the significant problems involved in this process cannot be considered in detail in this volume. A large

part of the subject matter relative thereto belongs to the allied studies of economics and sociology. A short consideration of some of the accompanying results upon the operation of government will be given in order to illustrate conflicting theories as to the purpose and functions of government.

Regulation of Business and Commercial Interests

Laissez-faire Theory and Regulation.—According to the theories and principles of the individualists, business and economic interests were to be regulated as little as possible. It was assumed that the economic struggle for existence would result in the survival of the fit and that this process would bring about the advancement of the public interests. The function of the state was to be limited to the protection of life and property and there was to be no interference between employer and employee or between buyer and seller, except to prevent fraud or monopoly.

The economists, such as Malthus and Ricardo, defended the rights of the mill owners and upheld the doctrine that there should be "no interference of the legislature with freedom of trade, or with the perfect liberty of every individual to dispose of his time and his labor in the way and on the terms which he may judge conducive to his interests." The investigation of the conditions in factories and workshops in England during the early nineteenth century disillusioned some of the individualists and marked the beginning of a series of laws and regulations affecting labor and industry.

The individualist, or *laissez-faire*, theory had, in many respects, its greatest development in the United States where the sparsity of population, the immense stretches of free land, and the wealth of natural resources rendered it possible for individuals of sufficient energy and physical vigor to make their way without aid from the govern-

ment or the need of social control. The pioneer conditions of the United States furnished a fruitful field for the operation of the *laissez-faire* theory. The governments of state and nation were formed at a time when the individualistic theory was dominant. "Following out the principle of limiting the government as much as possible, there were many restrictions on its action in the state constitutions. In long and eloquent bills of rights notice was served on government not to trespass on certain fields of individual activity." It was this view that led to the insertion of the phrases in constitutions to the effect that private property shall not be taken except for just compensation, and shall not be interfered with except by due process of law, and that the obligation of contracts shall not be impaired. And the protection to property and contracts extended by the guardianship of the courts has resulted in the condition to which President Hadley refers in the dictum that:

> The general status of the property owner under the law cannot be changed by the action of the legislature or the executive or the people of the state voting at the polls, or all three put together. . . . The fundamental division of powers in the Constitution of the United States is between the voters on the one hand and property owners on the other. Forces of democracy on one side, divided between the executive and the legislative, are set over against the forces of property on the other side, with the judiciary between them.[1]

In fact, it was the desire to protect property and contracts, and at the same time to preserve a sphere of individual liberty, that served to strengthen and extend the principle that courts should become the guardians of constitutions and that one of their functions should be that of defining and restricting the limits of legislative authority. The developing doctrine of judicial supremacy became the

[1] A. T. Hadley, "The Constitutional Position of Property in America;" *The Independent*, April 16, 1908; see also Elihu Root, *Addresses on Government and Citizenship*, p. 539.

mainstay of the supporters of individualism who were known as the defenders of civil liberty.[1]

It was the same doctrines which gave free reign to individuals and corporations to develop the vast resources of America, and often to prey unhampered upon human weaknesses and ignorance; and it was the same doctrines which led the courts to restrict labor legislation on the ground that it was an interference with the liberty of contract and that it was humiliating and degrading to the laborer to interfere with his right to contract for such wages and hours as he desired. Theories of individualism and *laissez-faire* retarded for a long time the progress of labor legislation and made it extremely difficult to regulate business and commercial dealings.

Regulation by States.—The regulation of business and commercial interests in the American states, in addition to the control exercised over public utilities, has been extended through (a) the granting of charters of incorporation; (b) special supervision over such matters as banking and insurance; and (c) efforts to maintain fair conditions of trade and competition.[2] The granting of charters, which was formerly done by special legislative acts, was later provided for by general laws, the terms of which could be applied and charters granted by the Secretary of State or some other state officer. It was customary to encourage the formation of corporations, to require few conditions, and to grant charters for long terms of years, or in perpetuity. A fee or tax was usually charged and certain states, by a very liberal policy in granting charters, raised a considerable part of state revenue in this way. A charter granted in one state rendered it possible to do business in other states by compliance with certain conditions laid down for foreign corporations.

[1] See Francis Lieber, *Civil Liberty and Self-Government*, and a more recent interpretation of the same view by John W. Burgess, *Political Science and Constitutional Law* (Ginn & Co., 1902).

[2] *Cf.* J. T. Young, *The New American Government and Its Work* (The Macmillan Company, 1915), p. 342.

Though corporation charters might be annulled by a *quo warranto* proceeding for an abuse of corporate powers, the process was judicial in nature, was difficult of application, and was rarely used by state authorities. By constitutional enactments and recent laws, however, more stringent requirements have been formulated, particularly with respect to long-term charters and other special privileges frequently accorded to incorporators. A check has also been placed upon the formation of companies to sell bonds, stocks, or other securities by the enactment of so-called "Blue Sky Laws," which are designed to prohibit the granting of permits to do business within the state without authorization from some state officer, and definite assurance that the company aims to do a fair and reputable business.

Banking and insurance have been regarded as semi-public in character, and around these enterprises special safeguards have been placed for the protection of the public. Companies doing business of this character are now subjected to inspection and control by a state commission or commissioner whose duty it is to see that the laws of the state are enforced and by frequent inspection and rigid supervision to place a check upon mismanagement which might mean a loss to the public. Regulation of banking has been extended to require the setting aside of a guaranty fund to reimburse depositors in case of bank failures.

In addition to the ordinary regulations regarding the granting of charters efforts have been made in many states to prevent monopolies and to prohibit unfair competition. Statutory provisions have had a twofold object; first, to protect business men from competitive practices harmful to them; second, to protect the public from dishonest or fraudulent dealings.[1]

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[1] In the ensuing pages some short extracts are used from an article by Charles Grove Haines on "Efforts to Define Unfair Competition," *Yale Law Journal*, vol. xxix, pp. 1 ff.

Antitrust laws in the various states attempt to cover a multitude of alleged business wrongs. Chief among these classes of enactments are the prohibition of monopolies and pooling, of agreements or conspiracies in restraint of trade, and of restraint of competition as distinct from restraint of trade such as price control, increasing prices, fixing a standard price or local price discriminations, limitation of output, division of territory or restraint on resales. Though monopolies and agreements in restraint of trade involve the principle of unfair competition, it has seemed necessary to enact special laws to provide that there may be "reasonable competition," and to uphold the doctrine of "free and fair competition," as an inherent right of the people.

It is difficult to summarize the laws relating to unfair competition. The prohibition of unfair competition is usually combined with the prohibition of combinations and agreements in restraint of trade. Recently, the statutes have dealt more fully and specifically with such unfair practices as are coming to be designated unfair competition. As a result of the experience of the last thirty years almost every state now has statutory provisions covering monopolies or restraint of trade or unfair discrimination, and in a majority of the states an effort is made to cover all three of these types of misdemeanors. There is a tendency to declare illegal all combinations to restrain trade, to limit production, to fix prices, or to prevent competition. Usually a penalty is imposed for a violation of the statute and not infrequently the Attorney-General is charged with the enforcement of the law by criminal prosecution or by *quo warranto* proceedings or by both remedies against offending combinations.

Regulation by Federal Government.—The first significant efforts on the part of the Federal government to regulate business were made in the enactment of the Interstate Commerce Act of 1887 and the Sherman Anti-trust Act of 1890. The nature of the former act has been previously described with the gradual extension of federal control

over railroads and other public utilities national in scope;[1] the latter was the culmination of an antimonopoly movement which began in the states and was designed to prohibit all contracts and combinations in restraint of trade and to punish violators with fines and with criminal penalties. The prevailing faith in competition unhindered by governmental interference was not at first seriously interfered with by the passage of these acts.

But during the administration of Theodore Roosevelt a series of investigations led to some startling revelations of corruption and dishonesty on the part of large business concerns. As a result of new evidence available a renewed effort was made to enforce both the Interstate Commerce Act and the Sherman Anti-Trust Act and an increasing number of prosecutions were secured under both acts. The enforcement of these acts as well as increased activity along this line by state governments resulted frequently in a mere change of form in business organization with a continuance of many of the evil practices condemned by public opinion. In some instances they led to such drastic action that the business interests involved secured the protection of the courts, and laws were held invalid. A condition of uncertainty was fostered because corporations found it impossible to know in advance what rights and privileges they had under the law, and an agitation arose for the formation of corporation or industrial commissions whose duty it should be to grant charters and define the conditions in accordance with general laws under which corporations could do business in the states. Similar uncertainty, as to the control of corporations doing interstate business, in the enforcement of the Sherman Anti-trust law prepared the way for two new acts—namely, the Clayton and Federal Trade Commission Acts.

The Trade Commission Act not only declares unlawful unfair methods of competition in commerce, but also directs the commission to prevent such practices by persons, part-

[1] *Cf. supra* p. 469.

nerships, or corporations, except banks and common carriers. The commission is authorized, after due hearing, to issue orders requiring the cessation of unfair practices, the enforcement of such orders, if necessary, being referred to the courts.

The prohibition of unfair practices is further extended by various sections of the Clayton Act, whereby it is declared unlawful for any person engaged in commerce to discriminate in price between different purchasers of commodities sold for use, consumption, or resale within the jurisdiction of the United States, where the effect of such discrimination may substantially lessen competition or tend to create a monopoly. It is also declared unlawful for any person engaged in commerce to lease or sell commodities, patented or unpatented, or to fix a price therefor or a discount for such goods on the condition that the lessee or purchaser shall not deal in the commodities of a competitor, where the effect of the lease or sale may be substantially to lessen competition or tend to create a monopoly. Labor, agricultural, or horticultural organizations are by a separate section excepted from these provisions. Instead of defining specifically unfair competition, Congress by general decree condemned unfair practices and left it to the Federal Trade Commission to determine what practices are unfair.

The Sherman and the Clayton Acts are in a measure declaratory of a principle of the common law, according to which "agreements tending to fix prices or to control the market may be null and void as in restraint of trade." Under this principle the courts have developed the doctrine of unfair competition and have built it largely on the theory that business rules and agreements must not be unreasonable or against public policy.

Numerous state laws have been passed to condemn unfair practices, and the decisions of the courts, Federal and state, have been arriving at the conclusion that in the competitive process the individual has rights which,

whether regarded as property or not, are entitled to protection, and that business practices unfair to both the injured party and the public must be declared inequitable and prevented by judicial process.

The most recent method of attacking the evils of unfair competition is to establish an administrative board whose duty it is to pass upon unfair practices and to correct, so far as possible, the evils resulting therefrom. The former method of procedure was to declare illegal unfair methods and to provide a private right of action against the offender. The nature of the remedy was an injunction to prevent the wrongful act or damages to cover losses resulting from such action. The common-law decisions with regard to unfair competition have been confined very largely to passing off of the goods of one for those of another and misrepresentation, with the result that the scope of the common law was a decidedly restricted one in the effort to prevent unfair methods. While the Sherman Anti-trust Act and state legislation relating to trusts gave a more extensive application of the general principles for the courts and rendered it possible to prevent certain unfair practices which would not have been held void under the common law, nevertheless the ineffectiveness of the private right of action has become notorious. Owing to the conservatism and the slowness of action in the determination of such questions before the courts, many cases have dragged on for a period of ten years or more and often cases were either dropped or inadequate relief was accorded. Moreover, those who suffer from unfair practices are often the small but efficient business establishments which find it impossible to carry their cases to the courts.

The enforcement of the provisions of such laws may be rendered somewhat more effective by giving special authority to the Attorney-General to prosecute on behalf of the state, on complaint of private parties or corporations. But despite these attempts to secure a better enforcement of trust legislation, cases on unfair competition often involve

economic and statistical facts, as well as legal principles, and to secure an effective enforcement of restrictive business laws it has been found necessary to provide additional agencies. For the purpose of enforcing Federal legislation the Federal Trade Commission was established, whose duties were briefly summarized previously. The work of the Federal Trade Commission has demonstrated the peculiar advantages in having unfair methods passed upon by an administrative body rather than leaving the condemnation of such methods solely to the courts, whether under common-law rules or the Sherman Anti-trust Act. Among the unfair methods which have been condemned by the commission are: Exclusive contracts, maintenance of resale prices, commercial bribery, passing off, misrepresentation, false advertising, accumulative rebates, tying contracts, intimidation of competitors, and inducing cancellation of orders from competitors.

The spread of regulation of business by administrative commissions [says Mr. Dunn][1] is one of the most marked and important politico-economic developments in the United States in this generation. The policy was first applied by a few states to railways. It has now been adopted as to railways by the nation and most of the states, and has been extended by several states to public utilities of many kinds. Recently men prominent in business and politics have advocated regulation of large industrial concerns by commissions.

The policy of regulating business, public and private, by commissions has been due to the belief that lawmaking bodies, courts and ordinary executive officials are unable to deal effectively with the difficulties involved in the control of business interests. According to Mr. Dunn:

The legislatures cannot deal with these problems intelligently and effectively, because to do so requires a body possessing expert knowledge and in practically continuous session. In both of these respects lawmaking bodies are deficient. The courts cannot satisfactorily deal with these problems because they lack expert knowledge and have many other kinds of business to transact, and because their slow,

[1] Samuel O. Dunn (Editor of the *Railway Age Gazette*), "Regulation by Commission," *North American Review*, vol. cxcix, February, 1914, p. 205.

cumbrous, and formal process excludes classes of evidence which, while logically irrelevant to a lawsuit, are precisely the considerations that would influence a business man in deciding a business proposition. The ordinary executive or law-enforcing officials are incompetent to deal with the problems of regulation because they lack expert knowledge, because they have other and entirely differing duties to perform, and because a regulating body should approach its work in a judicial spirit which is incompatible with the executive spirit by which the ordinary law-enforcing officials should be animated.[1]

It was to meet such difficulties that numerous regulatory commissions have been created. Experience with such commissions has been too brief to form a judgment as to their effectiveness and as to the permanence of their contribution to the cause of public regulation. It is clear that they have filled a gap in the effort of government to control business. It remains to be determined, however, whether the character of men selected for the commissions, and the quality of work accomplished, will warrant their continuance, or whether changes in the policies and attitudes of courts and legislatures toward the regulation of business and commercial dealing may gradually delimit the functions of such commissions as to undermine seriously their powers.

Regulation of Labor and Labor Conditions

When the theory of individualism prevailed the state was not expected to interfere in labor contracts. Under the conditions which existed prior to the industrial revolution there was comparatively little need for public regulation of wages or the conditions of labor. Though there were serious injustices and inequalities under the domestic system of manufacture of the eighteenth and early nineteenth centuries, the paternal attitude and interest of the home were seldom absent in the small workshop and tended to foster a humane interest in the laborer and his conditions for work. It was not until a scarcity of land

[1] Samuel O. Dunn, *op. cit.*, p. 205.

rendered it impossible to acquire ownership merely by labor, and large-scale production brought a class permanently dependent on wages, that it became necessary for public regulation to enter extensively the field of industrial enterprise. Even then the progress of labor legislation has been slow and has met with many obstacles in the enactment of laws and their enforcement. The story of the reversal of the individualist theories and the consideration of the wage earners and their conditions of work as a matter of public interest which requires governmental regulation is beyond the scope of this treatise.[1] A rehearsal of a few of the steps in the progress of labor legislation will aid in the understanding of the changes involved in the trend away from extreme individualism and in the direction of public regulation of industrial affairs. The trend of legislation will be briefly considered with respect to regulations for health and safety, efforts to regulate payment of wages and methods of settling differences leading to strikes, regulation of hours of labor, and social insurance.

Health and Safety.—Though under the *laissez-faire* regime the conservation of life, health, and energy of wage earners was considered an individual affair, it was found, with the growth of trade and manufactures, that action on the part of the state was imperative if the life and vigor of its citizens were not to be undermined or destroyed.[2] Consequently provisions were made by law to safeguard the worker from accidents, to protect him from the dangers of occupational diseases, and to place special safeguards around women and children. Much of this legislation was defective because of incompleteness and the absence of any well-defined standards, and because of defective methods of enforcement. Most of these difficulties have

[1] For a valuable account of the growth and the analysis of labor legislation, consult John R. Commons and John B. Andrews, *Principles of Labor Legislation* (Harper & Brothers, 1920).

[2] *Cf.* Commons and Andrews, *Principles of Labor Legislation* (Harper & Brothers, 1920), chap. vii.

been met by the establishment of boards or commissions to work out with employers and employees the best possible means of protection. This new method of regulating industrial conditions through administrative orders, cooperatively formulated and issued by a permanent commission, has resulted, in several states, in a progressive and accurate adjustment of factory inspection to the changing methods and new risks that accompany modern industry.

Mediation and Arbitration of Labor Disputes.—Next to regulations regarding safety and health, one of the first matters to attract the attention of the legislators was the payment of wages, and gradually laws were enacted laying down conditions as to the time, place, and basis of wage payments, and restrictions were placed upon deductions and mechanics' liens. But in view of the fact that controversies over wages were the chief cause of industrial warfare, with consequent strikes and lockouts, it was natural to expect the public, through legislative bodies and administrative agencies, to become interested in the methods of settling industrial disputes.

The movement for conciliation in labor disputes, which has resulted in the establishment of special courts in Australia and in other countries, has slowly received favorable consideration in the United States. A series of Federal acts provided for the conciliation and arbitration of disputes on railways which are regarded as detrimental to the public interest. To enforce these acts a board of mediation and conciliation was appointed by the President, whose duty it was to investigate labor disputes and to take steps to secure arbitration of the difficulties involved. By this means numerous controversies have been adjusted and a few strikes have been averted. The plan of arbitration was continued in the Transportation Act of 1920, with the establishment of a railway wage board composed of three members representing labor, three representing the railway management, and three representing the public.

The majority of the states have enacted laws relating to the settlement of industrial disputes, usually with the establishment of permanent boards of conciliation and arbitration. Many states require compulsory investigation, and Colorado, following the Canadian Industrial Disputes Act, requires a suspension of action by either party to the dispute until the state industrial commission has rendered a report. The American states have not gone so far as certain foreign countries which have prohibited the right of strike on railways or other public utilities. In certain instances the right to strike is not denied, but the right is restricted by the government requiring a notification and delay in action until a government investigation and report may be made. The Australian states and the Commonwealth of Australia have taken the most advanced steps in this direction. Here the right to strike upon railways and in practically all other industries is prohibited, and provision is made by state wage boards for the settlement of all industrial controversies. Special courts known as industrial courts are sometimes established for the settlement of disputes arising out of labor contracts between employers and employees. Continental European countries usually provide such courts, composed equally of employers and workmen. Procedure in these courts follows that of the conciliation courts previously described,[1] lawyers often being excluded and the process made as informal as possible. Rapidity in rendering decisions and relative lack of expense are the characteristics of these courts.

Judicial arbitration was adopted originally in New Zealand, and has been introduced in New South Wales, South Australia, Queensland, and Western Australia. It leads to the ultimate settlement of all industrial disputes by a court especially appointed, generally consisting of a single judge. In some cases, the judge sits with assessors representing the two interests, but as a rule the ultimate decision rests with the judge. These judges conduct pro-

[1] See pp. 384–388.

ceedings much on the same lines as those of a civil court. The parties become litigants, they file claims and replies, issues are enjoined, advocates are engaged, and elaborate inquiries in open court are held, evidence being called in support of cases, in reply, in rejoinder, in rebuttal; and in every way the paraphernalia of a court is maintained. Ultimately, the decision is left to the judge whose award, when made, becomes the standard for the industry. Owing to the fact that the system of judicial arbitration has tended to separate workmen and employers, a movement is now under way toward the investigation of industrial troubles, and their settlement by negotiation rather than by litigation.

The participation of the state in the settlement of industrial disputes is extended somewhat by the Industrial Courts Act (1919) of Great Britain and the act establishing the Kansas Court of Industrial Relations. The former creates a permanent court of arbitration to which industrial disputes may be referred if both parties concerned consent. Provision is made in the act for the appointment of courts of inquiry which shall make immediate investigation of any existing or apprehended dispute and give an impartial report of its merits to the public.[1]

As a result of the efforts of Governor Henry J. Allen, a special session of the state legislature of Kansas passed an Act establishing a Court of Industrial Relations which has become national in its interest and significance. According to the Act the court is to be composed of three judges appointed by the Governor, and the court is given full power to supervise and control all public utilities and common carriers within the state. In addition to the public utilities which are thus placed under the control of the court the following economic operations are declared to be effected with a public interest and to be subject to public supervision:

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[1] *Monthly Labor Review*, Bureau of Labor Statistics (February, 1920), vol. x, no. ii, pp. 41–46; W. H. Stoker, *The Industrial Courts Act*, 1919, and *Conciliation and Arbitration in Industrial Disputes* (Stevens & Sons, 1920).

1. The manufacture or preparation of food products.
2. The manufacture of clothing and wearing apparel.
3. The mining or production of fuel.
4. The transportation of above articles.

The court is given authority to investigate all interferences or attempted interferences with the operation of these essential industries. In case of continued interference in the operation of industries or employments the Court of Industrial Relations is authorized to institute proceedings to take over, control, direct, and operate such industry or employment. In the conduct of such industry there shall be a fair return to owners and a fair wage to workers.[1]

The act represents a form of compulsory settlement of wage disputes which labor has persistently opposed and its operation results in an experiment which will be watched with interest.

The most recent effort in the direction of regulating wages is the enactment of minimum wage legislation. Through numerous investigations in the United States and in foreign countries, it has been shown that the majority of unskilled industrial workers receive wages too small for decent self-support. One of the first attempts to remedy this situation by legislative action was the enactment by Victoria of a minimum wage law in 1896. The Victorian method, which involves representative boards to fix minimum wages in certain industries designated by the legislature, has subsequently been adopted in England and in certain American states, but has been applied in the latter principally to the wages of women and children. "The more rigid limitations of our written constitutions, the labor-union opposition, and the inefficiency of administration are factors which may work against such an extension of these laws in the United States as has taken place abroad." [2]

[1] See Willard E. Atkins, "The Kansas Court of Industrial Relations," *The Journal of Political Economy*, vol. xxviii (April, 1920), p. 339.

[2] Commons and Andrews, *Principles of Labor Legislation* (Harper & Brothers, 1920), pp. 178-179.

Hours of Labor.—One of the matters on which the state has entered with its legislative and administrative powers is the regulation of hours of labor. The movement for the restriction of the hours of labor began in the middle of the nineteenth century, the first acts defining the workday in an indefinite sense, usually stipulating ten hours, and suggesting as an ideal the eight-hour day. As there was no way of preventing contracts for a longer day, these acts had little effect. The first effective step in hours-of-labor acts was the introduction of clauses preventing laborers from working and employers from requiring service beyond the time specified by law, and the most effective of these laws were those made applicable to child labor. For railroads the legislatures established a maximum number of hours during which a train operator might be required to work without rest, and further established the number of hours of rest that must intervene before work might be resumed. In public service and contract work for the government the eight-hour day is almost uniformly provided either by constitutional amendment or by statute. The hours of labor for women are regulated in all but a few states. The time limit is from eight to eleven hours. A few states allow the time to be determined by a state industrial commission.[1] By means of legislation, collective bargaining, and other agencies there has been a marked decrease in the hours of labor required in the important industrial establishments.

Social Insurance.—Of special significance are the laws which aim to protect the lower paid workers and those who by injury or sickness are incapacitated from regular employment. The term applied to such protection is Social Insurance. Such insurance may take the following forms: (1) accident; (2) sickness; (3) incapacitation by old age or invalidity; (4) unemployment. The aim of social insurance is to provide an indemnity for the loss and expense involved in a misfortune that befalls a worker.

[1] *Cf.* Laws of California and Oregon, 1913.

The mass of misfortune requiring some form of aid is enormous, and when to the loss through accidents is added the appalling waste through sickness and unemployment the total is quite staggering. It is the aim of this type of legislation, in the characterization of Premier Lloyd George, to drain the morass of wretchedness, poverty, and degradation which results to those earning a bare existence when misfortune befalls them. The state first entered the field of regulating the methods of payments for industrial accidents.

The first legislation for compensating workmen for industrial accidents in the United States merely tried to alter the law of employers' liability so as to render compensation adequate and more easily obtainable. Gradually a new type of compensation law was enacted "granting compensation by a schedule fixed in the law, insuring greater certainty, more adequate payments, greater ease of securing redress, and abolishing the cost of lawsuits." But, in most countries, and in most states in America, the worker has the option of suing under the old law. Under the old employers' liability law in the United States workers found it extremely difficult to secure an indemnity for an accident, and as a rule the larger part of the proceeds was dissipated in legal expenses. From 1911 to 1916 the old liability laws were either changed or replaced to a great extent by new compensation acts. While these acts vary considerably in detail, the ideals which are sought to be attained are summarized by the American Association of Labor Legislation.

1. All employments ought to be included. Among the common exceptions are farm labor and domestic service and nonhazardous employments.

2. Compensation ought to be granted for all injuries, suffered in the course of employment, that cause disability beyond a definite period.

3. Compensation should include medical attendance for a limited period and two thirds of the estimated loss of

wages for disability, and in case of death, funeral expenses, and from one to two thirds of the estimated wages to the widow and children or to other dependent relatives.

4. Compensation should be the exclusive remedy, replacing completely the old method of suits in court.

5. The employer should be required to take out insurance under a plan of state insurance. In order to carry out effectively the above provisions it is necessary to create an accident and insurance board.

Workmen's compensation legislation was retarded in its enactment and enforcement on account of the adverse attitude of courts which held such laws unconstitutional. Though constitutional amendments and changes in the laws have removed some of the objections raised by the courts, the operation of compensation acts is necessarily restricted by judicial interpretation of constitutional inhibitions. Despite these obstacles, laws have now been enacted in most of the states, and their administration has, it is generally conceded, greatly improved the methods of paying workers for losses due to industrial accidents.[1] In 1916 a new Federal compensation act became a law. This act replaced the earlier law of 1908 and is significant in that better provisions are made for about a half million civil employees of the United States government.

Trade unions and fraternal societies began the system of sick benefits. The work of these societies were first encouraged by law through state subsidies and regulated accordingly. Out of these beginnings has grown the state systems of sickness insurance. Four per cent of the income of wage workers is now expended for the care of sickness and burial insurance. This amount, if collected from employers and wage earners, can, through state efforts, be made to give better medical service, to cover an indemnity for loss of wages, and to aid in securing better public

[1] See Report of Commission of the American Federation of Labor and the National Civic Federation to study operation of State Workmen's Compensation Laws, Senate Document No. 419, Sixty-third Congress, Second Session.

health. While this form of insurance has not received favorable consideration in many states, a number of states are preparing, as a result of special studies by commissions of investigation, to accept the principle of universal workman's health insurance. Investigating commissions have advocated

> . . . the inclusion of practically all low paid wage earners under a system providing adequate medical care and financial aid during illness; support of the system by joint contributions from employers, employees, and the state; and the entire exclusion of profit-making insurance companies from the field.

In addition to accident and health insurance, the majority of European nations have made similar provisions for old age and dependency. The United States, it is claimed, is "the only great industrial nation in the civilized world that has not already attempted a practical and permanent solution of this problem of old age and dependency."[1] The most recent development in social betterment is the attempt of the state to provide insurance against unemployment. There are two methods of state aid to the unemployed—one is to subsidize the relief afforded by trade-unions and the other to provide compulsory state insurance for certain industries. The system of subsidy of the trade-unions has been adopted especially in European countries; the compulsory system has been undertaken by Great Britain. The British Act went into effect in 1912 and was applied to approximately 2,500,000 wage earners. Contributions are made three eighths by employers, three eighths by wage earners, and two eighths by the state. This form of social insurance has not been adopted in the United States, although the serious difficulties involved in unemployment call for more effective remedies than have been applied. Social insurance is still in the experimental stage and it is as yet a question how

[1] L. W. Squier, *Old Age Dependency in the United States* (The Macmillan Company, 1912), p. 325.

far the state should go in bearing the burdens of the ills and weaknesses of our industrial system.

Regulation of Education and Social Welfare

Education.—From being a matter of wholly private initiative, as was the case in the United States as late as the middle of the nineteenth century, education has now become a very important function of government, both local and state. Moreover, present tendencies seem to indicate that education will become a matter of increasing concern of the national government. No longer is it a question to be determined by parents whether or not their children shall receive instruction in the rudiments of knowledge, nor is it left to parents to decide the subjects in which this instruction shall be given. The question likewise of the fairness of taxing an individual for the purpose of educating another person's child is no longer a debatable one.

In the early history of the United States the great majority of the people obtained what education they possessed through the rugged experiences gained in developing a new country. Where knowledge thus gained was supplemented by additional learning it usually meant little more than the ability to read, write, and cipher, which was acquired in a private school or through individual initiative. From this humble beginning the question of education has developed until it has come to be looked upon as a matter of public concern and as the greatest security of democracy, and, consequently, a very important function which should be performed by the government.

Public education to be provided for by general taxation was at first considered as a fanciful dream of the reformer and was regarded by the practical man of affairs as a futile and unnecessary project. But by the middle of the nineteenth century the restrictions which had previously been set for the electorate had been removed to a considerable degree. With the extension of the right of suffrage educa-

tion came slowly to be regarded not as a luxury to be indulged in at the will of the individual, but rather as the necessary foundation for a government which was to respond to the wish of the electorate. The maintenance of public schools from this time to the present became and has remained one of the primary functions of government. At first the function was performed almost entirely as a local one, but before long the state governments made specific requirements of localities and assisted in the carrying out of these requirements by the appropriation and application of state funds to meet local needs.

Along with the feeling that an education was the birthright of every child and with the giving to the child of an opportunity to come into his right has come a steady extension of the curricula of the public schools. The economic and industrial changes which occurred after the Civil War soon depleted the home of its ability to furnish the experiences and training to fit the child for the complex life which resulted from these changes. Hence, the public schools have been made to supply the deficiency and the curricula have come to include, in addition to the rudiments of knowledge, cultural and scientific studies, and training along educational and professional lines. What formerly was considered a function of the home or shop has now passed to the community to perform, usually with the aid and supervision of the state and along some lines under the guidance and assistance of the national government.

The World War revealed to the public, in a more or less sensational way, the fact of which educators have long been aware—namely, that the problems concerning popular education in the United States are both numerous and serious. To which department or departments of government, national, state, or local the solution of these problems will ultimately rest it is not necessary here to discuss. But since the government has assumed the task of popular education and since alarming deficiencies in it have become evident, a more serious attempt will necessarily have to be

made to bring popular education abreast with the present needs of a democracy.

Among these deficiencies which are now obvious are the lack of any unity in the educational policies and the wide diversity of educational opportunities which exist among the different states and even among different sections of the same state. The kind of education a child receives depends pretty largely on the community where the child happens to have been born and reared. If the citizens of a community are enlightened, progressive, and ambitious, the educational opportunities afforded by that community will doubtless reflect these qualities. If, on the other hand, nonprogressiveness, narrow-mindedness, and backwardness are the chief attributes, the school generation suffers accordingly. Just how the advantages of popular education are to be equalized more nearly than is now the case is still to be determined.

Also, the enforcement of the Selective Service Act revealed deplorable facts relative to illiteracy and physical inabilities of the young men of army age, and also brought to light the failure of a large number of aliens to become full-fledged American citizens even though they have lived and earned their livelihood in the United States for many years more than are required in order to become naturalized. Here again the question arises as to how the government may best function in the way of fitting this exceedingly large number of illiterates, physically unfit, and un-Americanized persons to assume a just proportion of the responsibilities involved in a self-governing group.

The lack of training and the immaturity of those entering the teaching profession is likewise deplorable. This is especially true of the personnel of the primary and secondary schools. The lack of tempting chances of promotion to well-paid positions is leading many ambitious young persons to look to other professions and avocations for their livelihood. While it is true that the teacher's best and most satisfying remunerations are not to be counted

in dollars and cents, it nevertheless becomes a disconcerting fact to a teacher of ambition when the financial returns of his efforts will not permit him and those dependent on him to live equally as well as the common laborer. Acknowledging that a popular electorate is safe only when it is an educated electorate, does not the filling in of the ranks of the teaching profession with mature, well-trained, and well-paid teachers become a matter of no small concern to the government which has taken over education as one of its important functions?

Social Welfare.—When individualistic theories prevailed it was not regarded as the function of the state to protect its citizens against unhealthful and insanitary conditions. What protection was accorded in this line was left almost entirely to private initiative. But the changes from the individual to the social theory of the functions of government have brought a radical transformation in this regard. The entrance of the state came first into the matter of the protection of the people from the ravages of dangerous diseases. With the increased concentration of population in cities and the consequent spread of diseases through unhealthful and insanitary conditions, the control of the state over conditions affecting the health has been rapidly extended. The development of medical science and the related sciences of sanitation and sanitary engineering have augmented the powers of public control. It has become the function of the state to assist in preventing the spread of contagious diseases by quarantine, vaccination, and other measures, to establish laboratories, and to conduct investigations as to health conditions, to assist in maintaining reasonable standards of purity in water, food, and drugs, and to join in the maintenance of conditions conducive to the health and vigor of all citizens. This function is performed by Federal, state, and local officers through boards of health and other officers who conduct investigations, inspect sanitary conditions, and who, through numerous agencies, disseminate informa-

tion and advice with respect to affairs related to the main
tenance of good health. In no line has the growth of stat
powers touched more vitally the life of its citizens an
rendered a more direct service to the individual.[1]

Just as in the case of health the changes in condition
the development of medical science, and the emergenc
of new points of view have placed upon the governmen
duties and responsibilities in the field of charities an
corrections.

> The old idea of charity was to provide free soup for those who lin
> up at the door, or to gather them into the almshouse—in short, to relie
> the immediate wants of the poor; the new thought is to help a fam
> to regain its earning power. The old system produced a class of chron
> dependents; the aim of the new is to remove the cause of dependen
> by cultivating self-respect.[2]

In short, the state has gradually assumed a responsibilit
for the care of the dependent, the defective, and the delin
quent. This responsibility may be assumed by a subsid
to private charitable and correctional institutions wit
a system of inspection of the work performed by them
or the establishment and maintenance of state institutions
To illustrate the extraordinary growth of governmen
functions in this field the state of Illinois has establishe
and maintains twenty-two institutions with plants value
at approximately one million each, and having on th
average more than a thousand inmates in each, and costin
for maintenance more than six million dollars annually
Owing to the variety of functions performed, the similarit
of the problems of administration involved, and th
necessity of some effective check upon the financial method
of these state institutions, an effort has been made t
establish centralized control and supervision over all th
institutions by means of a state board of control. As i

[1] See J. T. Young, *The New American Government and Its Work*, pp. 419–433
[2] *Ibid.*, p. 433.
[3] *Cf.* E. C. Hayes, "Democratization of Institutions for Social Betterment
in Cleveland and Shafer, *Democracy in Reconstruction* (Houghton, Mifflin
Company, 1919), p. 140.

other fields, there are not merely difficulties of administration to encounter, but also greater difficulties are involved in the determination just how far the duties and responsibilities of the state should be extended in the care of the dependent and defective classes, as well as in the removal of the conditions which foster such classes.

Ten years ago a noted historian observed that

> . . . the transformations through which the United States is passing in our own day are so profound, so far reaching, that it is hardly an exaggeration to say that we are witnessing the birth of a new nation in America. The revolution in the social and economic structure of this country during the past two decades is comparable to what occurred when Independence was declared and the Constitution was formed.[1]

What then appeared as a revolution has been carried beyond all anticipations by the stress and strain of war and by the necessary readjustments to return to a peace basis. Governments assumed functions which seem to have exceeded the expectations of the advocates of socialism. But the period of reaction has set in, and again, it is contended, that government functions should be reduced, that the protective functions of government be continued, but that the commercial, ministrant or developmental functions by which governments assist individuals in business, education, and social welfare should be reduced. The central issue of politics and government, then, is what are the functions which governments should perform and to what extent should individuals and their rights, privileges, and actions be subjected to social control.

That things are not fixed and unchangeable is indeed one of the first principles of life. Evidences of changes, adaptations to new circumstances and proposed revisions to meet the new conditions, are constantly being made. And government, like all other human products, is subject to the perpetual flux. The institutions amid which we now live are in the process of becoming something different.

[1] R. J. Turner, "Social Forces in American History," *American Historical Review*, vol. xxi, p. 217.

Political facts are elusive and evanescent. We no sooner have laid hold on facts than transformations take place that render facts uncertain and subject all information to a serious element of error. It is extremely difficult to discern the progressive and retrogressive changes in human affairs. All that can be done is to catch interpretative glimpses of the complex movements in which we participate. In the trenchant words of Lord Morley, "The fundamental reform for which the times call is rather a reconsideration of the ends for which all civilized government exists, in a word, for the return to a saner measure of social values."[1]

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[1] *Miscellanies*, vol. iv, p. 271.

Prepare a chart showing the present party divisions in the United States. Show how these parties are related to the standard divisions as between the radicals and conservatives.

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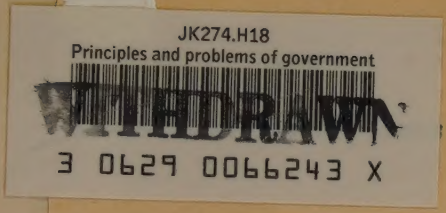

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